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A History of the Bankruptcy Clause
of the
Constitution of the United States
of America.

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By

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A DISSERTATION

Submitted to the Faculty of Philosophy of the Catholic University of America in Partial Fulfillment of its Requirements for the Degree of Doctor of Philosophy

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*Contemporanea Expositio est Optima et Fortissima in Lege.—
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CHAPTER I.

INTRODUCTION.

England's interference with the internal affairs of her North American colonies roused amongst the inhabitants a spirit of opposition which led to a long and successful revolution. In this struggle for independence the potential republic was embarrassed by the lack of a navy, of a permanent army and of a sufficient revenue. Moreover, the *Articles of Confederation and Perpetual Union* did not adequately provide for the National defense or for the regulation of commerce and industry. It was to remedy these and other deficiencies that a convention was called to meet at Philadelphia in May, 1787. In constituting a Federal system of government, that body provided for uniform laws and judicial procedure in regard to the rights of citizens of one State trading with the citizens of another. This was effected by the familiar commerce clause,¹ which was extended by the express grant of power to the Congress "To establish . . uniform Laws on the subject of Bankruptcies throughout the United States."² The history of this latter provision is the subject of the present inquiry.

Although James Madison played many important parts in the early history of the United States, none was more useful than his services as unofficial reporter of the proceedings of the Constitutional Convention and his subsequent exposition and defense of its proposed form of government. In addressing the people of the State of New York in *The Packet* of January 22, 1788, he dismissed the discussion of the bankruptcy clause of the *Constitution of the United States* with the remark that, "The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie, or be removed into different States, that the expediency of it seems not

¹ The Congress shall have power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, Sec. 8, cl. iii.

² Art. I, Sec. 8, cl. iv.

likely to be drawn into question.”³ This faithful and patriotic chronicler anticipated many of the problems and foresaw the benefits which the lawgivers of the republic would extort from this clause of the American Charter of Liberties. But neither he nor any statesman of his time could have foreseen the extensive development of the power granted by the clause to which he so tersely adverted. Casual attention had been given to the subject of bankruptcies in previous times. It was nearly overlooked by the framers of the *Constitution* and for thirteen years remained abandoned at the door of the Convention.

Madison's succinct statement opens many avenues of thought. He shows that relief from debt was considered important and desirable in that early and undeveloped stage of our country's commerce. Pre-existing State legislation on the subject of financial difficulty as well as numerous contemporary memorials invoking the application of the power granted to the Congress by the *Constitution* is evidence of its expediency. Madison also suggests that the prevention of fraud is a necessary antecedent both to credit and the growth of commerce; and that a people possessing an extensive store of natural resources requires that all laws relating to its general commerce shall be uniform. The fact that during the year 1915 more than 16,000 inhabitants of the United States applied for relief from insuperable financial obligations justifies Madison's judgment and is ample confirmation of the work done in that respect by the Convention.⁴

3 "The Federalist; A Commentary on the Constitution of the United States," edited by John C. Hamilton, Phila., 1865, Art. XLII, p. 336.

4 This startling statement is made by Stanley A. Dennis in "The Business Death Rate," an article in "System," Chicago, January 1916. "Of the 250,000 business corporations in the United States over 190,000 make less than \$5,000 a year, and more than 100,000 make nothing at all." Bradstreet's report for 1915 and for the previous fifteen years is also a revelation:

Year	Number of Failures	Assets	Liabilities
1901	8,710	\$ 51,243,504	108,326,330
1907	7,861	205,211,599	275,818,124
1908	11,763	149,524,735	262,260,257
1910	9,428	71,317,666	149,074,273
1912	11,399	83,949,503	166,581,396
1913	11,652	130,765,630	229,804,598
1914	12,981	165,353,622	298,639,077
1915	16,053	137,523,619	236,873,127

Injudicious buying resulting in tying up of capital is assigned as the cause of so many recent failures. From this excerpt which embraces only eight of the most calamitous years of the recorded period, it is evident that there were 89,847 failures, and in the fifteen years more than 135,000 unfortunates came under the jurisdiction of some relief laws, either the Federal bankruptcy law or some insolvency law of a State.

This gloomy part of the fundamental law of the United States has been truthfully characterized as the most intricate and complex clause of the *Constitution*.⁵ The fact can be readily explained. One must realize, to begin with, that it regulates a most serious human relation, that which concerns man's material welfare. The principles of bankruptcy laws are a departure from the common law, a comparatively modern creation developed in response to commercial demands and embracing concurrently elements of both the civil law and the criminal code. The relief measures which are bound up in this legislation are unorthodox in the realm of jurisprudence and are opposed to the basal principles of legal justice. Moreover, it is an extra-judicial mode of procedure allowed for the benefit of commerce.⁶ Prior to the adoption of our *Constitution*, the several States controlled the relation between the insolvent debtor and his creditor, and some of them desired to retain this right. The existence of two classes of insolvent debtors, the unfortunate and the fraudulent, which require different regulations, also complicates the system. Most of the records of its growth have been obscured in a maze of popular agitation and frenzied demands at critical times, of excited and hasty legislation, of too profound judicial interpretation and irregular executive administration. The principal sources of information and authority for a treatment of this subject are the history and laws of the older countries from which the system of the United States has been derived, and to this may be added the constitutions and laws of the State governments, the commentaries, the journals, the proceedings and debates of the Constitutional Convention and the records of the Congress.

Charity, the capital characteristic of the legislation on bankruptcies, has been likened to a cloak which covers a multitude of sins. Debt's sad presence has been felt in all ages. The condition of debt is in so many cases attributable to an indissoluble

5 Mr. Justice Story, writing about 1833, stated: "As a new question it [bankruptcies] is probably as much open to controversy as any one which has ever given rise to judicial argumentation." "Commentaries on the Constitution of the United States," II, 51.

6 In this connection Blackstone writes: "...the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction or implication." Cooley's edition, II, 479.

chain of events from which the debtor can not by his own efforts escape. Recognizing this, the framers of the *Constitution* not only granted the power, but, according to some interpreters, ordered that a cloak be made to protect the debtor from the bitter winds of misfortune and the cruel assaults of his creditor. Therefore, by virtue of delegated authority, they decreed that such protection should be provided and designated the tailor, the Congress of the United States, to whom they gave a monopoly. The cloak is to fit every insolvent debtor living under the American government, that is, to be of uniform application; but neither pattern nor material was specified. The data concerning this provision are unusually meagre. After careful consideration, however, this seems, for the most part, due to lack of definite knowledge on the subject by the members of the Convention.⁷ The systems of other countries were only casually mentioned in the debates, and no reference was made to the practice of State courts which afforded relief. To the confusion of Hugh Williamson, member from North Carolina, who advised the delegates to copy the then existing clause, no provision on the subject of bankruptcies was found in the *Articles of Confederation*. The weaving of this cloak has been the cause of much conflict between the champions of the debtor and those of the creditor. The former strive to make it extremely thick, while the latter prefer to have it flimsy and easily penetrable. Since the initial effort to legislate under this clause of the *Constitution* the conclusions have been compromises between these contending forces.

The design of this essay is to discover some germinal ideas of the leading principles of the existing law of bankruptcies, to describe the pattern according to which the weavers worked, to unfold the leading constructive stages in the observance of the precept of the framers and briefly to outline the system resulting from one hundred and thirty years of legislating for the amelioration of the relation between the unfortunate creditors and their still more unfortunate debtors. This will necessitate the collection and arrangement of a great amount of material which, directly or indirectly, gave form to the laws on bankruptcies as they have developed under the fourth clause of the eighth section

⁷ In conformity with the object of all constitutions, the clause covers the subject in the most general terms. The Constitution was intended to be a bold outline to be filled in by legislation.

of the first article of the *Constitution*. It will be necessary to trace the threads which have been woven into this protecting garment for the American debtor, and to make inquiry whether or no it is stronger and more serviceable, or more fragile than law permits or ethics demands. This clause passed through nearly the same process as other principles of the *Constitution*. Most of them have reached a somewhat definite form; but, according to some authorities, the clause on bankruptcies still affords opportunities for improvement.

CHAPTER II.

BANKRUPTCY LEGISLATION IN FOREIGN COUNTRIES
PRIOR TO THE CONSTITUTIONAL CONVENTION
OF 1787.

In the Constitutional Convention, which met in Philadelphia on the second Monday of May, 1787, our forefathers, in their wisdom, looked for precedents in well-established and older States, especially in England. Although "the American People had just completed a valuable apprenticeship in constitution making,"¹ many laws and customs then established were confirmed, others were slightly altered, and numerous old-world statutes were adapted to our form of government. The Federal bankruptcy provision was one of these borrowed features. To understand the reasons which led to the establishment of a system of bankruptcy laws it is necessary to investigate European experience. Sir Edward Coke's observation on the English bankruptcy code can be applied in turn to that of our country. "We have fetched," says that writer, "as well the name, as the wickedness, of bankruptcy from foreign nations."²

There are differences of opinion as to the origin as well as the meaning of the term *bankrupt*, and an examination of this matter will be justified by its furnishing a better understanding of the original rules on the subject. The explanation most generally accepted is that the word is a compound formed from a Latin noun, *bancus*, meaning a table or counter, and the perfect passive participle of a Latin verb, *ruptus*, meaning broken.³ The usual account is that a trader in the days of Rome's supremacy being disgusted and discouraged, broke his table where he kept his coins and plied his trade, thus demonstrating his emotions and his intention to discontinue business. Sometimes his creditors finding that he had fled and left nothing else on the premises

1 McCarthy, "Civil Government," p. 11.

2 "Institutes of the Laws of England," IV, ch. 63.

3 Dufresne, "Chronicon Paschale a mundo condito ad Heraclii imperatoris annum vigesimum," i, 969.

destroyed the table. Another explanation is that the term was used figuratively, just as we say now-a-days, "He is broke."⁴ Still another derivation strongly urged is that from the French, *banque*, a bench, and *route*, a trace or track; that is, one who has removed his bench leaving only a trace behind. This latter theory has considerable authority to support it. Lord Coke gives it as the explanation.⁵ Sir Thomas More uses the middle English form, *banke rouverte*.⁶ A good observation is that the first English statute on the subject was designed to embrace "such persons as do make bankrupt," a literal translation of the French idiom, *qui font banque route*.⁷ Byron later writes of a chapman "who was bankrout both of wealth and worth."⁸

Representative Newton, of Virginia, in the second session of the Seventh Congress, urging the repeal of the law of 1800, claimed authority for the use of the word *bankrupt* as a synonym for *trader* and *merchant*.⁹ No other opinions are found to support the use of the word in this broad sense. Others erroneously claim that it is derived from *bank*, the German name for a joint-stock fund, which was converted by the Italians into *banco*, meaning a heap or accumulation of money or stock.¹⁰ In colonial Massachusetts the issue of paper money was referred to as "raising a banke." But the word meant rather the money than the institution which put it in circulation.

Webster in the first edition of his dictionary (1828) defines a bankruptcy law as "one which, upon a bankrupt's surrendering

⁴ "A broken-up or ruined trader," Everett vs. Stone, 3 St. 453; Bouvier, "Law Dict." I, 320. Shakespeare uses this construction, and at the same time throws light on the practice of his time, when he writes:

"I know you are more clement than vile men,
Who of their broken debtors take a third,
A sixth, a tenth, letting them thrive
On their abatement." "Cymb." Act V, sc. 4.

⁵ "Banque in French is mensa;.... route is a sign or mark.... Metaphorically it is taken for him that has wasted his estate, and ruined his bank, so that there is nothing left but a mention thereof." "Institutes," IV, 63.

⁶ "And such banke rouvertes be these men of that good zeal,..." "Works," printed London 1557, by John Cawod, John Waly and Richard Totell, p. 881 f.

⁷ 34 and 35 Henry VIII, ch. 4.

⁸ Cf. Appendix a.

⁹ "Annals of Congress," 7th Sess., 1802-03, p. 557.

¹⁰ "Nuova Encyclopedia," Toreno, 1877. There are authorities who give these derivations, but they are evidently mistaken.

all his property to the commissioners for the benefit of his creditors, discharges him from the payment of his debts, and all liability to arrest and suit for the same, and secures his future acquired property from a liability to the payment of his past debts."¹¹ N. Bailey's English dictionary, published in 1742, and used at the time of the Convention, defined a bankrupt as one "who by the Laws of the Land is obliged by his Creditors to yield up his Goods, Chattels, Estate, and Debts, etc., for their Use, till they are discharged of their respective Debts as far as said Estate, etc., will allow." Also, "A Trader that breaks and steps aside with Design to defraud his Creditors." It is safe to assert that any or all of these ideas may be detected in both the early and present bankruptcy laws.

The most likely explanation of the origin of the term to be gained from an historical view of available opinions is that the practice of Rome was directly adopted by the English, while the name came indirectly from Rome through the medium of the French language, but was afterwards modified and finally reduced to the original Latin form by a subsequently acquired knowledge of its relation to the primary Latin or Italian words. There is good authority for this theory, because mutations of both laws and their titles occurred, as is briefly explained in the following way. Roger Vacarius, a trained Lombard legist, was invited to England by Archbishop Theobald, and in 1149, as is generally believed, wrote for the use of poor students, "who could not afford to purchase the Roman texts," a version of Justinian's Code illustrated by large excerpts from the Digest.¹² This Latin work is thoroughly academic in its treatment.¹³ It gave England an early acquaintance with Roman laws and customs, and from that time, the reign of Stephen, Roman and canon law were more generally studied, especially at a law school which Theobald subsequently established at Canterbury. It is not speculation to say that during that period was considerably developed the legislation on debt which several centuries later is found in concrete form. Also at that time ancient laws were

¹¹ Cf. "Congressional Record," 55th Cong., 2nd Sess., p. 2408.

¹² Cf. "Catholic Encyc.," s. v. Theobald, XIV, 567; also Pollock & Maitland, "History of English Law, etc."

¹³ A manuscript is preserved at Worcester, England, and portions of this book were published by Wenck at Leipsic in 1820.

altered, classified and renamed, as is usually the case in a codification. From the preceding analysis the conclusion is made that Vacarius ingrafted Roman legal principles at a time when Britain's ruling classes used the French language in administering the laws, which, to a considerable extent, maintained their Anglo-Saxon effect.

The preceding deduction is confirmed by a well-known occurrence of the same period. During the reign of Stephen, as well as the reigns of the first Edwards, the law regulating mercantile transactions was generally known as *Statute Merchant*, an unmistakably French term for a practice which, emanating principally from France, had been applied to the mercantile *jus gentium* over all Christendom. Upon being merged into the common law in the time of Edward I, the uncorrupted Latin designation, *Lex Mercatoria*, was substituted. As the relations of debtors and creditors, contracts, detinue and cognate affairs were the subject matter of *Statute Merchant*, it is not unreasonable to infer that at the same time the original title, *bankruptcy*, was revived in law books although the corruption of the word only gradually became extinct in common usage.¹⁴ Blackstone's authority supports this hypothesis. He states that, the underlying principle of the old English law defined a bankrupt as "a trader who secretes himself, or does certain other acts tending to defraud his creditors," and this was the cardinal principle of the Roman law.¹⁵

During twenty-five centuries the lawgivers of the world have periodically legislated on this human relation. In primitive communities a formulated practice was unknown, but it is reasonable to suppose that satisfaction for a hopeless debt was secured by labor or some personally inflicted punishment. In harmony with the spirit of those ages we can be certain that it was cruel. In semi-civilized parts of the earth harsh treatment of debtors persists. It is well established that in Pegu and the adjacent countries of East India a creditor is given full sanction in disposing of a debtor, his wife and children. Extreme cases are

14 For an interesting account of this transformation, cf. Pollock & Maitland, "Hist. Eng. Law." This adaptation of Latin terms to English institutions, though not as well known, was similar to the work done by Francis Bacon about five centuries later.

15 "Commentaries," Sharswood's edition, II, 284.

recorded in which a debt was satisfied by the creditor violating with impunity the chastity of the debtor's wife.¹⁶ Indeed, it can scarcely be believed that only a half century has passed since America and England surpassed many other nations in cruelty in respect to their treatment of debtors.

In relation to the laws of contemporary nations it would be logical to conclude that the Jewish race, the only one which then knew the true God, would have had comparatively humane legislation on this matter. Yet we read of an event which happened about A. M. 3108 or B. C. 895. "Now a certain woman of the wives of the prophets came to Eliseus saying: Thy servant, my husband, is dead and thou knowst that they servant was one that feared God, and behold the creditor is come to take away my two sons to serve him." The man of God told her to fill tanks with water, and they became oil, and then Eliseus said: "Go, sell the oil and pay the creditor."¹⁷ Another biblical reference is the familiar one by St. Matthew in the New Testament, which relates to the imprisonment of the debtor for a matter of one hundred pence; but satisfaction being made for a much greater obligation of ten thousand talents by the sale of the debtor, his wife, children and all that he possessed.¹⁸ Imprisonment for debt in the one instance is similar in character to comparatively modern insolvency laws, while the procedure against the unjust debtor is a specimen of the most rigorous of the early forms of bankruptcy laws. While these ancient records are not strictly pertinent, their manner of satisfying debt is the basis of and in many respects is nearly similar to the methods prevailing to-day.

The procedure for recovery of debt under rabbinical jurisprudence seems to have been exacting, for there is no trace of anything like a discharge unless the entire obligation was satisfied. Every *shetar* or sealed bond, according to the Talmud, operated as a mortgage on the debtor's land. Even the hour was marked in order to designate the exact preference. Division of the funds was not proportioned to the amount of the claims, but to the number of the creditors. For example, if there were five

¹⁶ Blackstone, "Universal Hist." II, c. 31; "Mod. Un. Hist.," VII, 128.

¹⁷ Douay, IV Kings 4, i; King James, II Kings, 4, i.

¹⁸ XVIII, 23-25.

creditors and the amount of the smallest claim was one fifth or less of the total liabilities, it was paid in full.¹⁹

The Athenian Draco is believed to have been responsible for the institution of the modern system of treating debt. It is recorded that, in his criminal code of B. C. 623, he was unusually harsh in his treatment of debtors. The purpose was to stimulate industry. He classified debt with murder and laziness as a capital crime. Thieves of pot-herbs and fruits and debtors were punished as severely as sacrilegious robbers and murderers. Draco considered the lesser offenses deserving of death, so there was nothing more severe for the most serious crimes. This rigor was somewhat abated when, instead of death as a penalty for debt, the unfortunates were compelled to cultivate and remain on the land the same as cattle and fixtures and to surrender their children to be exported as slaves.²⁰ To abscond was the alternative, and, as later in England, this became an extensive abuse.

Solon, in revising the tyrannical tablets of Draco, considered debt a misfortune rather than a crime, and mitigated the punishment of debtors. By his decrees, *Seisacthea*, [Relief from Burdens] he abolished servitude for debt and forbade anyone to lend or borrow money on the security of the person of the debtor. He ordained that what debts remained should be forgiven, and for the future, no man should engage the body of his debtor for security; but the bankrupt and his heirs forfeited Greek citizenship, a penalty more deeply felt than the loss of life or liberty. For these wise laws, enacted about 594 B. C., the ages have accorded him the title, "Benefactor of Men." Some, among them Androton, claim that in effect the debts were not cancelled by Solon, but the rate of interest was lessened and the value of the pound was increased from seventy-three to one hundred drach-

¹⁹ "Jewish Encyc.," Funk & Wagnalls, II, 493; Maimonides, "Yad," *Malveh*. XX; Tur, *Hoshen Mishpat*, civ. and "Bet Yosef," *ad loc.*

²⁰ "All the people were indebted to the rich; and either they tilled their land for their creditors, paying them a sixth part of the increase, and were, therefore, called *Hectimorii* and *Thetes*, or else they engaged their body for the debt, and might be seized, and either sent into slavery at home, or sold to strangers. Some (for no law forbade it) were forced to sell their children, or fly their country to avoid the cruelty of their creditors;...." Plutarch, "Lives," s. v. "Solon," Clough's edition p. 128.

mas.²¹ Gibbon infers that, included with many other institutions, the whole Grecian policy towards bankrupts was transported and set up with added severity on the banks of the Tiber.²²

The Roman *Laws of the Twelve Tables*, alleged to have been "more Draconic than Draco," were engraved on tablets of brass and promulgated by the Decemvirs in 451 or 450 B. C., and are described as having been "written in blood," especially the terrible section *de debitore in partes secundo*.²³ This section empowered the creditors, as a final resort, to cut the debtor's body into proportionate shares. The effect of the laws was that a debtor who was unable to discharge his obligations, upon judicial proof or confession of the debt, was allowed thirty days grace during which time he could in every way endeavor to satisfy the account. If no means of relief were found or the debtor made no effort to change his condition by some adjustment, he was delivered into the custody of his creditors. While thus privately imprisoned his daily food allowance was twelve ounces of rice. He might be bound with a chain not exceeding fifteen pounds in weight, and to arouse the compassion of his relatives and friends he was exposed thrice daily in the market-place. After thirty days he could be deprived of liberty *trans Tiberem*. In case of fraud or obstinate refusal the death penalty was inflicted. There are authorities who maintain that the stigma was extended by the Romans to the debtor's family and that they were sometimes

21 According to Diodorus, bk. II, c. iii, this principle was copied from the Egyptians. Cf. Plutarch's "Lives" s. v. "Solon," Clough's edition, p. 130.

22 Gibbon, "Decline and Fall of the Roman Empire," Mathuen & Co., p. 446; also, Staedtler, "Cours de Droit Romain," Louvain and Paris, 1902.

23 Restored fragments of the Twelve Tables which relate to debtors:

"Tabula tertia,

De aere confesso rebusque jure judicatis.

I. Aeris confessi rebusque jure judicatis triginta dies justi sunt.

II. Post deinde manus injectio esto, in jus ducito.

III. Ni judicatum facit, aut quips endo em jure vindicit, secum ducito; vincito, aut nervo, aut compedibus, quindecim pondo ne majore, aut si volet minore vincito.

IV. Si volet, suo vivito; ni suo vivit, qui em vinctum habebit, libras farris endo dies dato; si volet plus dato.

V. sexaginta dies endo vinculis retinetur

VI. tertiis mindinis partis secanto; si plus minusve secuerint, ne fraude esto"

Cf. "The Laws of the Twelve Tables," by T. Lambert Mears, Lond. 1882, pp. 530-31.

compelled to accompany him into slavery. Such were the conditions of the laws four centuries before the Christian era. Authorities differ, however, as to whether they were ever enforced. Gibbon, who manifests no favor for the poorer classes, preferred "the literal sense of antiquity to the specious refinements of modern criticism" in regard to this *Carmen Necessarium*, which even the children of Rome were compelled to memorize.²⁴ The opinion of most commentators is that the laws were interpreted to mean only the division of the money arising from the sale of the debtor into slavery. Bynkershoek endeavors to prove that the creditors divided not the body but the price of the insolvent debtor.²⁵ Blackstone in his *Commentaries* questions such barbarity among the dwellers of the Seven Hills,²⁶ and Taylor and Honoric agree with him that Roman polish and humanity prevented this in general practice. Tertullian, Quintillian and Victor Hugo refuse to accept such a construction of the laws.²⁷

The next important stage in the development of bankruptcy laws occurred at the time of the adoption of *Lex Poetalia*, about 326 B. C. This law prohibited contracts of usury, and provided that a debtor by swearing that his assets equalled his liabilities and surrendering his property could escape all the hardships of the *Laws of the Twelve Tables* and maintain his freedom.

Caesar is credited with having promulgated the law *Cessio Bonorum*, a leading principle of modern bankruptcy laws. In his work on the *Civil War*, he relates that when dictator he permitted debtors to yield their lands in payment to their creditors

24 Gibbon, "Decline and Fall of the Roman Empire," Bandry's edition, 1842, p. 289 et seq., also Cicero, "De Legibus," II, 23.

25 "Observ. Jur." I, i, c. 1 in Opp. tom, I, pp. 9, 10, 11.

26 "Commentaries," Cooley's edition, II, 472.

27 Taylor, "Comment. in L. Decemviril;" Heinecc. "Antiq." iii, 30, 4, also favors the moderate view. Gibbon, referring to Bynkershoek's observations, says, "yet his interpretation is one perpetual harsh metaphor; nor can he surmount the Roman authorities of Quintillian, Caecilius, Favonius." Cf. Aulus Gellius. "Noct. Attic." XX, i; Hugo, "Historie du Droit Romain," tom I, p. 234. Montesquieu asserts that the governments of Athens and Rome permitted the sale of the bodies of insolvents, and "a great many debtors sold their children to pay their debts." "De l'esprit des lois," bk. XII, ch. XXI.

at the valuation at which they were assessed before the war.²⁸ *Cessio Bonorum* originally allowed the retention of the rights of a Roman citizen for the reason that the distress arose from a civil strife. Under it all citizens were exempt from imprisonment, but it did not discharge the debt or exempt future acquisitions.

At this period in the history of Rome the doctrine of discharge originated and it was gradually extended. The motive which inspired the introduction of this legal principle was not commercialism, but a purpose to destroy one of the effects on private affairs of participation in a military campaign, an incident of nearly every war. As is usually the case with emergency measures, it was inadequate, was misapplied, and not affording permanent relief, we find that its provisions were not long observed. There followed great oppression of debtors, an abuse which caused numerous withdrawals to the Sacred Mount, and, on account of the vast number of the debtor class, occasioned great alarm to the Republic. The event which moved the Decemvirs to introduce a modification of the measures is said to have been the escape of one of these debtors from his creditor's house and his appearance in the Forum covered with wounds and blood.²⁹ Because of the broken pledges the fury of the populace was aroused, other debtors escaped from public dungeons and private prisons and seceded to their sanctuary. Manlius championed their cause and brought about a magnanimous reform.

The Porcian and Valerian laws, which prohibited the infliction of capital or even corporal punishment on free citizens, applied as well to victims of debt as to persons accused of crimes.³⁰

The codifiers, headed by the illustrious Tribonian, under the direction of the Christian emperor Justinian, in the year 533

28 "His rebus confectis, quum fides tota Italia esset angustior neque creditae pecuniae solverentur, constituit, ut arbitri darentur; per eos fierent aestimationes possessionum et rerum, (a) quanti quaeque earum ante bellum fuissent, atque eae creditoribus transdarentur. Hoc et ad timorem novarum tabularum (b) tollendum minuendumque, qui fere bella et civiles dissensiones sequi consuevit, et ad debitorem tuendam existimationem, esse aptissimum existimavit.

(a) Possessionem et rerum, bonorum scilicet immobilium et mobilium.

(b) Novae tabulae, i. e., novae rationes pecuniarum debitarum et creditorum lege conficiebantur, si quando fides publica laboraret. Tum debitores minorem summam, quam quantum mutuo sumpserat in libros rationem novos referebant, minusque solvebant." "Civil War" by. III, c. i.

29 Dionys. "Halicarn., Roman. Antiq.," bk. VI.

30 Promulgated in A. D. 190 and 260 respectively.

embodied in their treatises the first purely charitable treatment of debtors. This code, *Corpus Juris Civilis*, which has come down to us, provided that if a debtor yielded up all his property to his creditors, he should not be continued in prison.³¹ It seems that under an extreme abuse of humanity great injustice arose. By swearing that he was unable to pay his debts, the debtor was relieved from the payment of them, an indulgence which encouraged fraud and perjury. At this period of Roman history, the bankruptcy law, as well as the other branches of legislation, assumed statutory form; but as Roman splendor declined, and its earlier customs crumbled, the laws on the subject of debt fell into the general decay. They were re-established in the commercial republics of Italy,³² but before that time the principles of that legislation had been carried to England, the next country in which an earlier form of the present American system is discernible.³³

There are few records of the method of indemnifying a creditor in Britain during the Roman occupation and throughout the Norman period. During feudal times, when warfare was an im-

31 "Eum quoque qui creditoribus suis bonis cessit, si postea aliquid adquisierit quod idoneum emolumentum habeat, ex integro in id quod facere potest, creditores cum eo experiuntur; inhumanum enim erat spoliatum fortunis suis in solidum damnari." TIT. VI, De Actionibus XLIV. "The Institutes of Justinian," Abdy & Walker, Cambridge, 1876.

32 Calhoun asserts that bankruptcy legislation began at this period of the world's history in the commercial republic of Venice. "And we accordingly find that the system commenced in the commercial republic of Venice, and has been confined exclusively, so far as my knowledge extends, to commercial communities." "Speeches," II, 508.

33 The treatment of debtors in the Roman State may be further examined by consulting the following works:

Blackstone, "Commentaries," Cooley's edition, II, 472-488.

Gibbon, "The Decline and Fall of the Roman Empire," Bandry's edition, 1840, pp. 289 et seq.

Plutarch, "Lives," s. v. "Solon," Milman's edition.

Dufresne, I, 969.

Bynkershoeck, "Observ. Jur.," I, i.

Heineccius, "Elementa Juris Civilis," (Göttingen 1787).

Heineccius, "Antiq.," III, 30, 4.

Hugo, "Histoire du droit romain," tom, I, p. 234.

Niebuhr, II, 313.

Aulus Gellius, "Noct. Attic." XXI.

Taylor, "Comment. in L. Decemviral."

Montesquieu, "De l'esprit des lois," bk. XII, ch., XXI.

Muhlenbruch, "Doctrina Pandectarum," (Halle 1839).

Sohm, "Instits. of Rom. Law," tr'd by Ledlie, (Oxford 1901).

Moyle, "Institutes of Justinian," (Oxford 1833).

Howe, "Studies in Civil Law," (Boston 1896).

Ortolan, "History of Rom. Law," tr'd by Cutler, (Lond. 1896).

Amos, "Hist. and Principles of Rom. Law," (Lond. 1883).

portant occupation of men, there was little commerce in England. The freedom of the body for military service prohibited imprisonment for debt. This condition prevailed throughout that period everywhere in England except in the cities. Even in the cities which had commerce, there was scant need of relief laws either in England or on the Continent prior to the thirteenth century. Use of money as a medium of exchange had been almost abandoned, and all exchanges, if any occurred, were made in kind. The beneficent effects of the crusades on England were not restricted to their influence on the intellectual life of the people. England's importance in the world of commerce was first realized after the fourth crusade, which was undertaken in 1204. This was the first of the pilgrimages to the east to be undertaken by water. Transports over the Mediterranean were obtained at Venice and Genoa. When the Italian ship-owners landed their passengers at Jaffa and other oriental ports, in order that their ships should not return empty, they loaded them with silks, spices, steel armor, blades and other commodities and carried them back to the west. There they found ready sale, which encouraged Genoese and Venetian mariners to set up agencies in the eastern emporiums, and, irrespective of passengers, to make frequent trips. In time western products were exchanged for those of the east. The English, while in Palestine, had learned the superior quality and use of the products of that country, and thus an exchange was established between England and that region. To encourage the development of this distant trade a credit system, derived partly from the Asiatics and partly from the commercial republics of Venice and Genoa, was introduced. Bills of exchange, letters of credit and currency came into use. But this stage of commercial development was not reached until the close of the thirteenth century and the opening years of the fourteenth. Hence, until that time, few debts were contracted.³⁴

34 Cf. Dunbar, "The Bank of Venice," "Quarterly Journal of Economics," VI, 308 and VII, 310 et seq.; Jenks, "The Early History of Negotiable Instruments," "The Law Quarterly Review," January, 1893; "Use of Bills of Exchange in Flanders in the 13th Century," in "English Historical Review," XVII, 555; Encyc. Brit. 11th edition, s. v. "Banks and Banking," and "Bills of Exchange"; Palgrave, "Dict. of Pol. Sc. etc." and Thompson, "Reference Study in Medieval History," s. v. bibliography on Medieval money and banking, Chicago, 1914, pp. 151-2.

Cf., also, Adams, "Civilization During the Middle Ages," (Revised edition, New York, Scribners, 1914) p. 291; Ashley, "Medieval Civilization," (Mac-Millan 1916) p. 524; Munro, "A History of the Middle Ages," (Appleton 1902), p. 120.

While the Norman system of government solidified the State, feudalism, by its very nature, almost disintegrated a centralized political authority, weakened the judiciary, and, as a result, prevented the institution and the progress of bankruptcy as well as other general laws. During the Norman period few such enactments are recorded.³⁵ The *Magna Charta*, extorted from King John by the barons at Runnimeade in June, 1215, provides that it is illicit to seize the lands and revenues of a debtor when his movable or personal goods are sufficient to pay his debts and he is willing to surrender them to his creditors.³⁶ For many years English jurisprudence would not permit violation of personal liberty for debt; real property alone could be taken in satisfaction.³⁷ From plea rolls of those times, preserved in the British Museum, it is established that the government, as well as the churches, "lived Roman Law." The ecclesiastical courts of England then had great influence on the development of common law practice, and this, in part, accounts for the charitable spirit permeating laws on the subject of debt.

To conciliate the feudal spirit, and at the same time afford satisfaction, the debtor and creditor resorted to wager of battle. If the plaintiff proved his superiority, the lands of the debtor, by a judgment or recognizance made before the debt was contracted, became vested in the creditor; otherwise, the obligation was extinguished. The above mentioned bond was a confession of legal guilt which the outcome confirmed. At a later

35 The earliest records in England of writs for the collection of debts show that the creditors promised the king a quarter or third of the amounts they sought to recover. Cf. "Excerpta e Rotulis Finium," i, 209, 49, 62, 68. ("Harvard Law Review," iii, 12). They include plea rolls of Rich. I; "Rot. Cur. Reg." (Palgrave) i, 39, 380; ii, 9, 106, and of John, "Select Civil Pleas" (Baildon) pl. 38, 83, 102, 146, 173, and 174. They occur more commonly in the "Note Book," and latest rolls of Henry III. Cf. "Harv. Law Rev.," iii, 112, 114, 172, 215. Glanvil records an action of debt and one of replevin, and, upon contest, trial by battle.

36 "Nec nos nec ballivi nostri seisiemus terram aliquam nec redditum pro debito aliquo quam diu catalla debitoris sufficiunt ad debitum reddendum, nec pleggii ipsius debitoris distringantur quamdiu ipse capitalis debitor sufficit ad solutionem debiti et si capitalis debitor defecerit in solutione debiti non habens unde solvat pleggii respondeant de debito et si voluerint haveant terras et redditus debitoris donec sit eis satisfactum de debito quod ante pro eo solverint nisi capitalis debitor monstraverit se esse quietum inde versus eosdem pleggios." Cf. Stubbs, "Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward I," p. 298.

37 Benton, "Thirty Years in the United States Senate," I, 292.

period the issue was decided by an oath with compurgators. The presence of a certain number of these "oath-helpers" was required as witnesses of every contract, and it was criminal to enter into one without them. Another method employed for determination of a debt during the era of ecclesiastical supremacy was the taking of an oath at the altar. Glanvil writes of a case in which one of the litigants prevailed by oaths at twelve altars as against his opponent's oaths at four.³⁸

First from the Jews, who came to England in the wake of the Norman conquest, as serfs of the king and under his liege wardship and protection, and later from the Lombards, Englishmen learned to borrow and lend money and to extend and receive credit for the price of goods. At first the influence of these foreigners did not extend far beyond the court, but their methods harmonized with the policy Great Britain early adopted aiming at the encouragement and protection of trade. During the latter years of the reign of Henry VIII and the entire rule of Elizabeth many of the laws were framed with these ends in view. All things were planned to show a balance of trade favorable to the kingdom. Exports, except that of gold, which was forbidden under heavy penalty, were aided in every manner, and imports were controlled and limited. Without credit commerce must always be embarrassed, but payment of financial obligations must be enforced in some way or commerce and credit can not long endure. Then, as in every age, laws of bankruptcies were passed in response to commercial necessity, and to the control of such laws the commerce of the world, to a considerable extent, owes its gigantic proportions.³⁹

The *Statute Merchant* and *Statute Staple* were practices which arose in pursuance of 13 Edward I, Stat. 3, c. i., and consisted in

38 According to Glanvil's account, "Treatise," bk. X, p. 14, and that of Bracton, "Treatise," f. 61, (b), this was a Germanic custom instituted much earlier by Anglo-Saxon legislators. They held the opinion that the contract of sale and much that pertains to it is thoroughly Germanic. "Scraps of Roman phraseology are brought in only to be followed by qualifications amounting to contradiction." Cf. Pollock & Maitland, "Hist. of English Law," I, 140, 150, 224, 485; II, 214, 542, 600, 634, 636.

39 Blackstone in his "Commentaries," states that the establishment of bankruptcy laws, as well for the punishment of the fraudulent as the relief of the unfortunate trader, was a capital alteration of the English legal polity, and highly convenient to the character which the country assumed of a great commercial people.

entering security before the Mayor of London or the chief warden of a trading town whereby the lands of a debtor were conveyed to the creditors until out of the rents and profits derived from the property, there was sufficient to satisfy the debt. The former was also entitled *Action Burnel*, from the place of its enactment.⁴⁰ As statutes providing for the collection of debts, they are the earliest in English jurisprudence, having been enacted in 1283. The statute, *de Mercatoribus*, closely followed, enlarged and applied *Action Burnel*.⁴¹

The first statute specifically treating the subject of bankruptcy was 34 and 35 Henry VIII, in the year 1542. This was a purely involuntary measure between which and an insolvency law the English quite early made a distinction. The former applied to traders and merchants, "merciers" and "chapmen," whose property consisted usually of merchandise and chattels, and the latter to persons out of trade. By this statute the Lord Chancellor and other high officers were empowered summarily to seize and distribute insolvent estates.⁴²

Imprisonment for debt was instituted in England during the reign of Henry III.⁴³ The motive for it was to furnish the

40 Cf. "Charter of Philadelphia," 1701, for "Action Burnel" in America.

41 Blackstone, "Commentaries," Cooley's edition, II, 160. This custom, to an extent, survives.

42 Ibid. Sharswood's edition, III, 428.

43 The philanthropist, Colonel Richard M. Johnson, to whom the abolition of imprisonment for debt in the United States was largely due, in a report to the Congress, carefully reviews this period. He says: "This extension was an act of policy on the part of the monarch. The ascendancy obtained by the barons menaced the power of the throne, and in order to counteract their influence, the merchants, a numerous and wealthy class, were selected by the monarch and invested with the same authority over their debtors." Cf. Benton, "Thirty Years in the United States Senate," I, 291 et seq. Imprisonment for debt was not abolished in England until after the precedent of the United States in 1833. During Jackson's administration an act of the Congress abolished imprisonment for debt upon processes issuing out of the United States courts. This act could not be interpreted to exert any compulsion in the case of debtors confined under the State laws, but its influence was great, and in a brief period all of the States followed the example of the National Government.

The prevailing opinion that imprisonment for debt was formally ordained by statute in England can not be supported. At any rate, prior to 34 and 35 Henry VIII, there appears to have been no express statute in England permitting imprisonment for debt. The practice grew up, as noted above, under the common law, but seems never to have been authorized by the Parliament.

barons a method whereby they could force the withholding bailiffs to pay over fines. The remedy was applied and the punishment inflicted at the pleasure of the barons and without trial. Debtors were summoned to court under the pretext of imputed crime and the constructive theory that their refusal to pay an obligation constituted a breach of the peace and was a hardship on the king. The doctrine was held that the creditor, usually a baron, on account of the defalcation of his claim, was unable to pay his obligation to the crown.⁴⁴

By the *Writ of Middlesex* the privilege was defined and extended. The courts, which were decentralized and controlled by the nobles, interpreted and applied the rule in a lax manner. In order to paralyze the rapidly acquired power of the peers, Edward I, in the eleventh year of his reign, extended the right to all merchants except Jews, who on account of heterodoxy, at that time were denied many privileges and were most unjustly treated. This innovation caused great consternation, and sixty years elapsed before the Parliament ventured to pass another act developing the use. In most cases invoking the statute the charge was fraud; and it is reasonably certain that the English people of that period sanctioned imprisonment.

During the reign of Edward III the privilege of imprisonment as redress for debt was more generally extended, but not to ordinary creditors. The idea began to prevail that the debtor was a criminal, unworthy of the protection of the law, and too degraded for society. Judicial interpretation and usurpation resulted in the temporary decadence of the system. The Parliament hesitated to legislate on the matter, and during a period of more than one hundred and fifty years the subject was untouched in England's legislative halls.

Meanwhile the judiciary reared a superstructure on this foundation and by every possible construction and form of fiction strove to extend the power of the creditors to embrace cases not contemplated by the statute. Originally the jurisdiction of the Court of the King's Bench embraced only serious infractions of the king's peace; but from this court the practice of issuing *Writs of Middlesex* was permitted upon the supposition that the

debtor had trespassed the dignity of the Crown and thus exposed himself to custody for criminal action. While thus detained he was proceeded against in a civil action.

In an endeavor to maintain its co-equality with the King's Bench, the Court of Common Pleas, the jurisdiction of which extended to only civil actions arising upon civil transactions,⁴⁵ by *ultra vires* methods, extended its powers unreasonably beyond its prerogatives. Upon the fictitious plea of trespass constituting a legal supposition of outrage against the peace of the kingdom, this tribunal issued a *Writ of Capias*, and subsequent imprisonment, in cases where the summons only was warranted by law.⁴⁶

The Court of Exchequer, previously designed to protect the king's treasury and revenue rights, also ingeniously extended its powers to include actions of debt. It claimed that a debtor, impaired the revenue by failing or refusing to pay his creditor, who in turn was unable to discharge the royal obligation.⁴⁷

The statute 34 and 35 Henry VIII took cognizance of traders who fraudulently failed. Action was instituted *against*, not *by* them. The reason which prompted this statute, prevention of fraud, has prevailed in all systems of bankruptcy legislation, and was evidently in the mind of Madison when he urged as justification for the provision in the *Constitution* that "it will prevent so many frauds where the parties or their property may lie or be removed into different States....." Blackstone records the motive for the law and its limited application. At that period England became a trading nation. Before long colonization set in, and the privilege of monopoly became familiar. The interdependence of national success, commerce, credit and the inviolability of obligations was recognized, and it was to encourage, develop and protect trade that the law was created.⁴⁸ Only traders were liable to accidental losses and consequent inability to meet their obligations without fault of their own, since they participated in unusual risks for the benefit of a commercial nation. It

⁴⁵ "All civil actions between subject and subject." III Black. 40.

⁴⁶ Benton, I, 293.

⁴⁷ Ibid. Cf. *Cutler vs. Southern*, 1 Wms. Saund., 113; in the Exchequer, 1667.

⁴⁸ "The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders;...." Marshall, C. J., in *Sturges vs. Crowninshield*, 4 Wheaton's Reports, 122.

was furthermore limited to merchants, because, as a class, they were supposed to have peculiar facilities for delaying payment of their debts and defrauding their creditors. At that time merchants were the only class assuming extraordinary obligations, and, on account of hazardous journeys by land and sea, they were liable to losses and insolvency without being at fault. The law of 1542 was, therefore, intended to apply to only fraudulent or absconding merchants, to deprive them of property without discharge from the obligation and to put them at the mercy of their creditors. The purpose was not so much relief of the debtor as the protection of the creditors. The following reasons for the discrimination were advanced. Generally trade can not be carried on without mutual credit. If a man pay for a cargo before it is delivered, the shipper is the debtor; if at the delivery, he is debtor *en voyage*. Therefore the contracting of debt is in most transactions not only justifiable but necessary. It was considered a misfortune if through loss of the ship by a tempest or the money in transit, or by the failure of fellow traders or non-payment of persons out of trade, a trader was rendered incapable of meeting his obligations. The benefit which traders confer on the country was considered to justify the privilege. Blackstone concludes: "To the misfortune, therefore, of debtors, the law has given a compassionate remedy but denies it to their faults; since at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also (to discourage extravagance) declared that no one shall be capable of being made a bankrupt, but only an *industrious* trader."⁴⁹

Another motive for the statute, 34 and 35 Henry VIII, was to persecute the Jews and Lombards, who during a period of nearly two hundred years controlled the finances and commerce of England. Brandenburg, after studying this enactment, concludes

⁴⁹ The jurists of that time considered that "if a gentleman or one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: but if at such time he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers the punishment which he has voluntarily drawn on himself." "Commentaries," Cooley's edition, II, 474.

that it was established "as a protection against the Lombards and fraudulent traders, . . ." but "without limit as to the persons who could become recipients of its provisions."⁵⁰ In its conclusion, the statute's operation applies to such persons as "craftily obtaining into their hands great substance of other men's goods, who suddenly flee to parts unknown or keep their houses, not minding to pay or restore to their creditors their debts and duties, but at their own will and pleasure consume the substance obtained by credit of other men, for their own pleasure and delicate living against all reason, equity, and good conscience."⁵¹ It is evident that this enactment was not aimed at debtors in general but at fraudulent debtors. The law was administered by the Lord Chancellor and other high officers, who, upon notice, seized the property of the debtor and distributed it amongst the creditors, a procedure relatively simple and expeditious in that age.

It is well established that by an old section of the common law an absconding debtor was, in one form, "a trader who secreted himself or his property in order to defraud his creditors"; and shutting himself up at home, taking sanctuary or not attending to his affairs was considered equivalent to departing the realm. An act of this sort by the trader was justification for applying the rigors of the early English bankruptcy law. This principle survives in the laws of that country and in nearly all other systems at the present time. In England under the operation of this law, as well as in the United States at one time, a person could have been thoroughly solvent but at the same time adjudged a bankrupt. We see, therefore, at the outset that English bankruptcy laws by establishing and stabilizing credit were designed for the benefit of trade, the natural occupation of that country; and every change in the laws was a response to the requirements of business. A little later was recognized the economic and social advantage obtained by expediting the return of the unfortunate trader to solvency and society.

In this matter of limiting the benefits of the law to the transactions of traders a line of cleavage is noticeable between countries which imitated Rome and those which followed the develop-

⁵⁰ "On Bankruptcy," p. 2.

⁵¹ 34 and 35 Henry VIII, c. 4.

ment of the Teutonic races. The former limited its application to commercial debtors, while the latter extended it equally to all citizens. The sixteenth century was the age of the absconding debtor even as the nineteenth was that of the preference-giving debtor. After the former epoch all laws were designed to prevent and correct the evil of absconding.

The statute 13 Elizabeth, c. 7, established an important distinction between traders and non-traders which lingered three hundred years in English juristic history, and may be found as late as 1898 in the laws of the United States. This legislation limited the benefits to traders and defined that class as "such persons only as have used the trade of merchandise, in gross or retail, by way of bargaining, exchange, rechange, bartering, chevisance, [contracting] or otherwise or have *sought their living by buying and selling*."⁵² Another feature of this act was a description of deeds by the commission of which a trader could be declared a bankrupt and could be carried into court and to the debtors' prison.

The law 21 James I, c. 19, enlarged the code, the main addition being the extension of its provisions to several other classes than traders as defined by Elizabeth. It included in the classification bankers, brokers, scriveners, whether aliens, denizens or natural born subjects of the Crown; but its operation against farmers and tax-collectors was specifically denied. Provision for discharge was included in the view taken by legislators during the reign of Queen Anne. At that time debt was not looked upon as a crime, as Englishmen of an earlier and quite frequently of the present age regard it, and for the first time the rights of the debtor as well as those of the creditor were considered in formulating a law. Upon giving up, without fraudulent concealment, all his effects for distribution among his creditors, the debtor was exempted from the exactions of the judge-made law whereby he might have been confined, even though in reality there was nothing to satisfy the obligations. Lord Loughborough sometime earlier detected this tendency and in *Sill versus Worswick* ⁵³ established a departure from the criminal view, remarking that, "the law, upon the act of bankruptcy being com-

⁵² Blackstone, "Commentaries," Cooley's edition, II, 473.

⁵³ I. H. Bl. 665; cf. Parson, "On Contracts," III, 425.

mitted; vests his property upon a just consideration; and not as a forfeiture; not as a supposition of crime committed; not as a penalty." This act of 1706 also permitted the bankrupt to retain certain valuables, and is, perhaps, the origin of exemptions. Discharges were readily obtained, and allowances of three *per centum* to ten *per centum* were not rare. As usual, the rule of excess entered here and turned leniency into abuse. In addition to removing the criminal character from bankruptcy legislation this enactment first provided for a certificate that the defendant had fulfilled the requirements of the law.⁵⁴

The next radical step was taken during the fifth year of the reign of George II. At that time a practice of assignments and preferences, long followed in Scotland and imitated in England, received official notice by legislators. The precept was first laid down that, "the voluntary assignment of a debtor to an assignee of his own choosing even though without intended preference is an act of bankruptcy."⁵⁵ By this statute any offense against public trade was fraudulent. Several species of fraud were noticed, viz: the bankrupt's failure to surrender himself to his creditors; his non-conformity to the several statutes; his concealing or embezzling his effects to the extent of twenty pounds and his withholding any books or writings with intent to defraud his creditors, "all of which the policy of our commercial country has made felony without the benefit of clergy."⁵⁶ It is a fact that, by a statute of James I, bankruptcy, even without fraud, was, with owling and smuggling, considered a felony without the benefit of clergy.⁵⁷ Also a bankrupt could not prove that casual

⁵⁴ These rules were known as 4 Anne, c. 17, and 10 Anne, c. 15.

⁵⁵ 5 George II, c. 30.

⁵⁶ Kent, "Commentaries," I, lect. XXXVII, p. 321 et seq. Remarking on the procedure of this period, Blackstone says, that the principle was well recognized but never practised that "insolvency and bankruptcy laws were intended to secure the application of the effects of the debtor to the payment of his debts, and then to relieve him from the weight of them."

⁵⁷ James I, c. 19. Benefit of Clergy was an indulgence of being tried in ecclesiastical courts, which usually mitigated the punishment. This privilege was first extended to clerics, then to those who could read and finally to citizens at large. The policy persisted in America until late colonial times. Cf. Pollock & Maitland, "History of the English Law," I, s. v. "Clergy"; Green, "History of the English People," II, i; "Catholic Encyc.," II, 477; Flanagan, "History of the Church in England," (1706); Chitty, "Criminal Law," s. v. "Benefit of Clergy"; Desmond, "The Church and the Law," Chicago, 1898.

loss was responsible for his condition. "He was set in a pillory for two hours with one of his ears nailed to the same and cut off." An amplification of this statute by 32 George II, c. 28, made it a felony punishable by transportation for seven years, if a prisoner charged with execution for any debt over one hundred pounds refused on demand to discover and deliver up his effects for the benefit of his creditors. At the same period of English history, usury, cheating by false weights and measures, forestalling, regrating, speculating, monopolies, practising a trade without learning it and transporting artisans were merely misdemeanors. As in our land at a later period, we see the laws regulating the relation between debtor and creditor vacillating for the advantage of the party more influential at the time. The legal pendulum next swung in favor of the debtor class in the time of George IV. A palimpsest of the system as existing in the preceding reign had been transported to America. After a brief treatment of English bankruptcy legislation subsequent to and affecting American laws, the main discussion will be resumed in connection with the American enactments.

Until 1825, by statute 6 George IV, c. 1., the British government did not recognize the doctrine of voluntary bankruptcy. Prior to that time, the chief aim of all legislation had been the protection of the creditor, and this practice constantly stimulated the growth of a stringent body of coercive or involuntary bankruptcy laws. Under this late ruling the debtor was permitted to solicit and procure the liquidation of his affairs. Also, about this time the principle of private settlement or composition became a prominent part of the English law on debt. The merit of this feature is appreciated and utilized by adjusting obligations as soon as a debtor realizes that failure is inevitable. This act also consolidated the former laws and introduced important alterations, especially one removing jurisdiction from commissioners appointed by the Lord Chancellor.⁵⁸

A radical departure in procedure was made by the statute 1 and 2 William IV, c. 56, which ordained that, instead of the debtor being brought into the regular courts, a Court of Bankruptcy in charge of four judges and six commissioners should

⁵⁸ Cf. Bouvier, "Law Dictionary," I, 321.

have jurisdiction and act as a tribunal of first instance as well as a court of review. Prior to this ruling, a summary jurisdiction had been given to the Chancellor and writs were issued out of chancery, an ancient custom strengthened by statute. Appeal was allowed, however, from the Court of Bankruptcy to the Lord Chancellor as to matters of law, equity and questions of evidence. This act also provided for official assignees and is the source of that feature of the bankruptcy laws which has finally developed the institution of referees in bankruptcies and the court of supervision. Other improvements were made by 5 and 6 William IV, c. 29. In the latter years of the reign of George IV, the arrangement was modified in response to a demand of the commercial element, then dominant, to the extent of putting jurisdiction entirely in the hands of commissioners.

During the reign of Queen Victoria bankruptcy legislation was further improved and many of its features were defined and consolidated. Several important principles were added in 1841. In 1869 jurisdiction was given to the County Courts, and in London to the London Court of Bankruptcy. In 1883 it was finally established in the King's Bench Division of the High Court of Justice. Also, during this reign, the system was codified. As early as 1690 Scotland recognized the injustice of preferences and annulled them. The common law of England did not interfere in any transactions which occurred more than two months prior to the assignment, nor was this matter made the important concern of bankruptcy courts until 1869, when the principle of fraudulent preferences was added, prohibiting a wide abuse of adjusting property in favor of relatives and preferred creditors before the rumblings of failure were heard beyond the hearth.⁵⁹ Another departure at this time was the complete abolishment of the distinction *traders only*. The full benefits of the bankruptcy laws were extended to all non-traders who before were amenable to only laws of insolvencies. In this regard the United States was twenty-eight years in advance of England, for in this country the distinction was abolished in 1841. The enactment, 24 and 25 Victoria, was preceded by the Bankruptcy Consolidation Act of 1842, by the provisions of which an action could be

⁵⁹ The law against preferences is fully construed in *Shawhan vs. Wherritt*, 7 Howard, 627.

begun by the petition of the debtor to the court, and certificates of satisfactory discharge were awarded according to the merits of the case.

An act of January 1, 1870, gave the system its present form. The commissioner-judge court was discontinued and administration by creditor-trustees was established. The court was stripped of all its criminal jurisdiction which was relegated to the "Debtors' Act," abolishing imprisonment for debt except in unusual or extreme cases. This was accomplished by a plain discrimination between fraudulent bankrupts and those whose condition was due solely to misfortune. As consolidated in 1883 and amended in 1914 the salient features of the present English system will be explained in a comparative manner in the course of this discussion.

It is obvious that the system discussed above is an evolution of beneficent principles and a development of procedure. It is the outcome of the struggle between the debtor and the creditor classes, for and against big commercial interests and with officialism. At this time when a consecutive treatment of the history of the English bankruptcy legislation is concluded, it is certain that, except in details, the codes in England and America were identical. It was at an earlier day that the United States adopted in its entirety the body of laws on the subject then in force in England. The necessity of outlining the development of bankruptcy legislation in that kingdom is readily understood. The leading features of the American system were highly developed in Great Britain long before America had any concrete form of laws. The United States has carefully watched and in many instances imitated the alterations of English laws. England has reciprocated; therefore, a careful study of the one or the other conduces to a better understanding of either or both systems.

CHAPTER III.

BANKRUPTCY LEGISLATION IN THE COLONIES AND IN
THE STATES PRIOR TO THE CONSTITUTIONAL
CONVENTION.*

In the early stages of any novel enterprise at all hazardous to human life, as was colonization in America, the natural tendency is towards an intimate and confidential inter-dependence of those who brave the dangers. This condition prevailed in the infancy of the colonies, and in many of them the political status was absolutely communistic. In noticing this fact Doyle cites the case of Plymouth colony. The spirit of that progressive settlement encouraged the growth of industrial and commercial systems.¹ As in Virginia, New Netherland and most of the other provinces all members of the community worked as an organized band under the direction of the governor; all produce was poured into the common store-house and out of it the settlers were supplied, while the surplus became *the general* or the profits of the company. The institution resembled the old, and, perhaps, fabulous Teutonic village or *Mark*, as modified by the English manorial system. Governor Hutchinson describes the social conditions of early Massachusetts, especially as they affected the administration of the laws.² Under these primitive conditions little or no cause existed for invoking any law for the collection of debts; but this elysian state did not endure, and before long the little communities began to feel the evils which, in a proportionate degree, afflict older and larger states. As usual the reaction was oppo-

* "It is said the Colonial and State legislatures have been in the habit of passing laws of this description for more than a century," Marshall, C. J., in *Sturges vs. Crowninshield*, 4 Wheat., 122-208, (1819).

¹ The industrial system and also the commercial scheme "with which the colony started was one of pure communism." Doyle, "English Colonies in America," I, 55.

² "They were thus without a code or body of laws, and the colony just come to its birth, their sentences seem to be adapted to the circumstances of a large family of children and servants." "The History of Massachusetts, from the First Settlement Thereof in 1628 until the Year 1750." Printed at Salem 1795 by Thomas C. Cushing, I, 384-386.

site and at least equal. Of this fact there is ample evidence. Internal complexities grew apace with intricate relations without, for much of the activity of the colonies was of a commercial nature. Debts within the province, those between residents of the various colonies and even those due to residents of foreign parts, were contracted and demanded some common system of laws whereby the contentions could be adjusted and the condition relieved. It was natural and almost obligatory to adopt and adapt the laws of England, and this was gradually accomplished. Many circumstances, such as location, climate, resources, population, foreign relations and the charter and fundamental privileges, limited and determined the English common law principles as they were applied to the several commonwealths.³

The charter of King Charles II to William Penn has a clause which is typical of one of the conditions under which all the charters were granted. It permitted great laxity of law making, "*Provided*, nevertheless, that the same Laws be consonant to Reason, and not repugnant or contrary, but (as near as conveniently may be) agreeable to the Laws and Statutes, and rights of this our Kingdom of England." This sweeping grant gave freedom for the development of Penn's great doctrine that, "Governments like clocks go from the motion men give them and as governments are made and moved by men, so by them are they ruined too."⁴

For a time the true medieval spirit prevailed; all but a few of the necessities of life were brought to the market-place. No person was allowed to engross goods. Other restrictions on trade were established on account of exigencies and for the purpose of giving the community more effective control of the activities of individuals. The store-house form of marketing was specifically

3 Doyle makes this statement: "Each of the colonies started with a general acceptance of the English common law. But in each case the special needs of colonial life, and the peculiar conception of the obligations which bound the individual to the community, led before many years to the establishment of a code." II, 62. Cf. "Public Records of Plymouth, New Haven and Connecticut."

4 "Preface to Frame of Government 1682." "Charter and Laws of Pennsylvania," 1676-1682, p. 93; also Hazard, "Annals of Pennsylvania," I, 491.

prescribed for Pennsylvania by the Proprietary.⁵ Under the provisions of the charter of Virginia a *Cape Merchant* was appointed, under whose supervision all trade was publicly conducted. Magazines also were provided to which all produce was brought and from which the settlers were supplied. In this arrangement of commercial affairs there was no urgent need for laws regulating the payment of debts, for, it is probable that few, if any, were contracted.⁶

Time changes affairs; the right of adaptation is a better term than the right of revolution. Late in the seventeenth century, or early in the eighteenth, throughout the sea board colonies, this condition changed radically. At that time the colonies turned to seafaring, and trade, first with the West Indies, and later as the size and number of their vessels increased, with all parts of the commercial world, became their principal occupation. At that early period they discovered the division of the world's work for which the Western Continent is preëminently fitted.

At first much of the colonial merchandise was carried in foreign bottoms. Soon, however, in response to necessity, ship-building was established, and, on account of the forests of America, found profitable and encouraged. At that time the main topic of legislation in each colony, from New Hampshire to Georgia, was the regulation of commerce. It was the all-important occupation of the era, and in pursuit of it in some of the colonies even religion was forgotten. Towards the upbuilding of a merchant marine all their energy was directed. The result is seen in two hundred and twenty-two vessels sailing from New York harbor in the year 1729, nearly as many from Boston, and a proportionate number from the other Atlantic ports. In 1737 fifty-three vessels of sixty tons or more were owned by shippers of New York.⁷ Throughout this period the disposal of debt

5 "There shall be no buying or selling, be it with an Indian, or among one another, of any Goods to be exported but what shall be performed in publick Market, when such places shall be set apart or erected, where they shall pass the publick Stamp or Mark." "Certain Conditions and Concessions agreed upon by William Penn, Proprietary and Governor of the Province of Pennsylvania, and those who are the Adventurers or Purchasers in the same Province, the Eleventh of July, One Thousand, Six Hundred and Eighty-one." "Acts of Assembly of Pennsylvania" 1687-1742, p. XXV.

6 Cf. Doyle, "Virginia, Maryland and the Carolinas," p. 11.

7 Cf. Doyle, "The Puritan Colonies," II, 28.

followed more or less closely the English common law, some variation of it, or the procedure of some other country in certain colonies. The usual, and perhaps the only method of adjustment, was to deprive the debtor of his property and to vest it in the creditor, and subsequently acquired possessions were held liable for attachment. Imprisonment was widely practised. Formal release or discharge was unknown, but in isolated cases after the creditor had acquired as much as it seemed probable he could obtain, prosecution was discontinued.⁸

The foot-prints of the founders of the republic, especially such as were taken for the alleviation of debt, are now, for the most part, obliterated. Happily traces of a few important steps remain available for study, and they will be considered in chronological order. This question will be discussed but slightly as to many of the colonies, while in some of them it will be given detailed attention, for it is manifestly impossible in a brief essay to define the treatment of debt in all the colonies.

Virginia, in May 1607, was the first part of England's American possessions to have a permanently instituted form of government, for the attempts at colonization by Gilbert and Raleigh were unsuccessful. Legal punishment in early Virginia was founded on a semi-military and maritime basis and was extremely arbitrary. Satisfaction of one's creditors was forced by deprivation and torture. While the system of a common fund, under the supervision of the *Cape Merchant*, endured, if

8 We have the weighty authority of Mr. Justice Story, writing in 1833 before the discriminating doctrine of discharge had been added to the American code, that, "No laws ever were passed in America by the colonies or States, which had the technical denomination of 'bankrupt laws,' but insolvent laws, quite coextensive with the English bankrupt system in their operation and objects, have not been unfrequent in colonial and State legislation. No distinction was ever practically or even theoretically attempted to be made between bankruptcies and insolvencies." He continues, the system was "borrowed from continental jurisprudence and derivately from the Roman law." "Commentaries on the Constitution," (1891) II, 51.

That the practice as well as the terms were greatly confused is established by Judge Story's observation that, an "historical review of the colonial and State legislation, will abundantly show, that a bankrupt law may contain those regulations, which are generally found in insolvent laws; and that insolvent laws may contain those, which are common to bankrupt laws." Ibid. This doctrine survived under the early Federal system, and was part of the ratio decidendi in the leading constitutional case on the subject, *Sturges vs. Crowninshield*, supra. The same commentator writes that the custom of imprisonment for debt "was carried back to the worst ages of paganism."

any case arose, that official adjusted it, proceeding under the laws of England as known and practised in Virginia. The fund system, of course, operated only in regard to the exchange of produce in the colony and did not extend to commercial relations in other matters.

By Queen Elizabeth's patent to Sir Humphrey Gilbert, the proprietors were given full power to make laws and ordinances, "as near as conveniently might be to the laws of the realm, and not opposed to the Christian religion as professed by the Church of England."⁹ Raleigh's patent was exactly like it in this respect.¹⁰ The charters of the London Company under whose patronage Jamestown was founded, and that of the Plymouth colony, provided for a council of thirteen, subject to the General Superior Council in England.¹¹ The governor and his council had control of local affairs, but they must rule "according to such laws, ordinances and instructions as shall be in that behalf given and signed with our hand or sign manual," that is, according to the king to whom all radical laws were submitted. The colonists and their children were to enjoy all the liberties, franchises and immunities "of native born subjects of the crown."

As the community progressed, the necessity for peculiarly adapted laws arose, and, in conformity with the charters, they were provided. Cases of debt were tried by the governor and his council. Virginia's laws of this period, for the purpose of establishing and developing trade, seem to have been unusually exacting and to have shown little mercy to debtors. Cultivation

9. Richard Hakluyt, "A Discourse Concerning Western Planting," (1584) III, 174. Cf. Doyle, "Maryland, Virginia and the Carolinas," p. 47.

10. Hakluyt, p. 297.

11. This superior council consisted of eleven courtiers, two archbishops, six lay peers and three functionaries, forming a commission, any five members of which had power of protection and government over all the English colonies. They had "authority to make laws, orders and constitutions and to inflict punishments either by imprisonment or restraints, or by loss of life or members." Palfrey, "A Compendious History of New England from the Discovery by Europeans to the First General Congress of the Anglo-American Colonies," (1884) I, 155.

of trade was also the foremost policy of England at that time¹² Mr. Newton, of Virginia, speaking in the House of Representatives, February 18, 1803, said:

"It has ever been a policy of most of the States, and with confidence I speak of the State of Virginia, not to impair the obligation of contracts, nor absolve a man from his debts. The only releasement from a debt or contract is to pay the one and perform the other. To protect the debtor from the oppression of the creditor—to which, in some countries, the creditor can at will subject the debtor—insolvent laws are in force, by the provisions of which the debtor can liberate his body from imprisonment, by assigning over his estate, both real and personal, for the benefit of the creditor. A debtor who has taken the benefit of the insolvent law cannot be imprisoned again by the creditor for the same debt, though the property given up by him is insufficient to pay the debt of the creditor, but the subsequent acquisitions of the debtor are made liable to pay the debt of the creditor."¹³

This practice was due to the fact that Virginia, perhaps more than any other colony, retained close relations with England, in the beginning adopted the English code and carefully followed its developments. For this reason further treatment of Virginia's laws on debts and bankruptcies does not directly contribute to the explanation of the growth of the Federal system anything which is not discussed elsewhere.

Plymouth was the next settlement made by English immigrants. There one would expect to find that charity had been cultivated, and that justice was the guiding principle in their legislative and judicial proceedings. Their extreme rigor, however, led to punishment of anything considered a disorder.

12 A side-light on Virginia's procedure is given by John Cotton's "An Account of Virginia." He complains that, "By a law of 1663, no debt is recoverable in that country unless the goods for which it became due be imported thither; so that in case a man became bound here, or in any other part of the world, for his necessary subsistence, as meat, drink, lodging, etc., yet such obligation is of no force or validity there: Nay though the goods for which the bond is passed be actually shipped on board, and by some misfortune perish, either by falling into the enemy's hands, or be cast away upon the voyage, and though the debtor becomes rich after the time." "Collection of the Mass. Hist. Soc.," V, 149. That their laws were arbitrary is established by Cotton's statement that the law in Virginia was "in the judge's heart." *Ibid.* 146.

13 "Annals of Congress," 1802-03, 7th Congress, p. 559.

Reference has been made to the customs which prevailed in the early experience of this colony, which through the greatest antipathy to the English observances, endeavored to reject and substitute for them.¹⁴

In the Massachusetts Bay colony the same conditions prevailed. That too, did not originally adopt the common law, and as late as 1634, according to Palfrey's account, Winthrop and his friends in the magistracy and ministry advised, "for reasons of wisdom and policy," that a formal code with provisions conforming in all respects to the conveniences and wishes of the people "would professedly transgress the limits of our charter, which provides we shall make no laws repugnant to the laws of England;—but to raise up laws by practice and custom had been no transgression, as in our church discipline and in matters of marriage."¹⁵

Hutchinson, in his history, confirms the above statement. He says that in civil actions, equity, according to the circumstances of the case, seems to have been their rule. "The judges had recourse to no other authorities than the reason and understanding which God had given them." . . . "In punishing offenses, they professed to be governed by the judicial law of Moses, but no farther than those laws were of moral nature."¹⁶ This and the following opinion prove that the common law of England was not enthusiastically adopted, but rather that it was spurned. By the year 1634 the Massachusetts Bay colony had greatly increased in population, and settlements were extended more than thirty miles beyond the capital town; therefore it was considered timely to have well-known and established laws in order that the inhabitants might not suffer from vague and varying judgments. The ministers and some of the principal laymen consulted about a body of laws suited to the civil and religious circumstances of the colony. Particular laws of great necessity were from time to time promulgated, and in 1648 the inhabitants grew bold and produced what has been termed a declaration of independence. Nathaniel Ward, of Ipswich, asserted with the unanimous approval of the General Court that, "without [beyond] the restrictive legislation of the charter of the colony, the colony was su-

¹⁴ *Supra.*, p. 33.

¹⁵ "History of New England," I, 177.

¹⁶ "The History of Massachusetts, etc." I, 384 et seq.

preme." He also declared that the laws and orders of the General Court and the word of God were fundamental laws, and provided capital punishment for twelve offenses. The laws enforced by the magistrates were "no other than equity, as its principles and rules existed in their own reason and conscience instructed by Scripture."¹⁷ Appeals lay from Town Courts to the Inferior Courts, then to the Court of Assistants and finally to the General Court of the colony. There were no barristers, and juries were prohibited owing to the claim that there was no reference to them in the Bible. A code of laws spontaneous among these people surely would be unlike that from the jurisdiction of which "their very tender and scrupulous minds" had led them to banish themselves from "their dear country, friends and acquaintances, and launched into an unknown world rather than submit to anything against their judgments and consciences."¹⁸ The constitution of their Church would not permit nominal ecclesiastical courts, and it became imperative for the civil magistrates in Massachusetts to provide for the punishment of numerous offences which were not defined as misdemeanors in the English law. In England such processes were within the jurisdiction of the ecclesiastical courts. Palfrey shows, as a response to the motive for the laws, their foundation on the Bible and the rigor of public opinion in enforcing good conduct, that there is no doubt that flagrant and insistent debt but rarely existed in the early days. The offender was either banished or socially ostracised. Their standard of punishment was widely opposed to that of Penn, which was comprehended in his doctrine that "The true design of all punishment is to reform, not to exterminate mankind."¹⁹ That there were inequalities in wealth is proved by the enactment of laws for the recovery of debts and for the relief of the poor. The first real distress arose from speculations in iron mining, from which, "instead of drawing out bars of iron for the country's use, there was hammered out nothing but contentions and law suits."²⁰ The state papers contain the complaints of unfortunate speculators that their estates had been seized and

17 Palfrey, "A Compendious History, etc." I, 280 et seq.

18 Ibid., 276 et seq.

19 "Preface to the Frame of Government."

20 Hubbard, p. 374.

their agents unjustly imprisoned. It is obvious that the colonial tribunals afforded scant relief or redress. As an example of their summary judicial procedure a Writ of Attachment is cited.²¹

The public gibbet on the shore of New Netherland in the foreground of Van der Donck's picture is suggestive of the nature of the laws of early New York, a colony of Holland founded primarily for gain. The form of land-tenure was semi-feudal, and this, together with the trading occupation of the settlers, and their difference of nationality, resulted in varied laws on the subject of debt as well as on other matters. The first colonists arrived in 1612. Fort Orange, where Albany now stands, was the most important settlement. Fifty-two years later the territory was captured by an English fleet. A few references will be made to the Dutch rule during this short period; but after the English acquisition, Charles II gave it to his brother, James, Duke of York, who introduced the so-called "Duke's Laws," which operated and developed much the same as in Pennsylvania, in connection with which State they will be noticed more carefully. New Jersey was a part of the territory claimed by Holland and was governed by the same laws as New Netherland.

During Peter Stuyvesant's administration as Director General, he received a petition complaining of great frauds by merchants of New Amsterdam, and others of South River and the village of Beaverwyck setting forth the paradox that, those "who do not pay could sell cheaper than those who do pay." The petition recited that some time previously the creditors furnished the "inhabitants on the South River, in the neighborhood of their former forts Nassau and Casimir, with several cargoes, for the payment of which the majority of the inhabitants mortgaged

²¹ "To the Marshal or his Deputy.

"You are required to attach the goods and lands of William Stevens, to the value of one hundred pounds, so as to bind the same to be responsible at the next court at Boston, 29th of the 5th (a) month, to answer the complaint of Mr. James Astwood in an action of debt to the value of fifty pounds upon a bill of exchange; and so make a true return hereof under your hand. Dated 29th 2nd month, 1650.

Per curiam,

William Aspinwall."

(a) Hutchinson, "Hist. of Mass.," I, 399. This method of designating the months was used in certain colonies, notably Massachusetts and Pennsylvania, in opposition to the ordinary names of the months, which were rejected on account of their pagan origin.

their lands, houses, and all their real property. Said debtors, by removing to the colony of New Amstel, endeavor to sell and alienate, to defraud their creditors, which is against all law and justice." Stuyvesant issued a "warning." He declared null and void all such sales and transfers made without the consent and knowledge of the creditors. Buyers were "warned not to make any payments on such purchases, unless a formal notification is made previously of their intention, under penalty of being compelled to pay the price a second time to the creditors, unless done in the presence or with the consent of all concerned."²²

Hazard states that, the goods of an individual, of the name of Outhouse, were attached in New York, but permitted to be transported to Delaware to be deposited until the debt should be paid. The Court, contrary to the governor's order, released the goods and gave a longer time for payment. The governor held the Court liable, and required it to secure all charges from the debtor's estate, and if the Court could not do so, it was held to make the amount good.²³ Another case of debt is recorded. It is that of Jeuffra Armgardt Printz *alias* Pappegay *versus* Andrew and Pricilla Carr for the sum of three thousand guilders, Holland money, a sum equal to about three hundred pounds. The jury awarded for the plaintiff and the governor confirmed the decision and directed the sheriff to levy, and, after appraisement, to put the plaintiff "into the possession of said Island, Tinnicum and the stock thereon, which if not sufficient, levy on other property of Carr."²⁴ Dutch punishment was extraordinarily embarrassing and their greatest ingenuity was exerted to maintain credit and secure the payment of accounts in order to preserve the commerce of the colony. The preceding incidents will illustrate the procedure under the Hollanders, which prevailed until the time of the English accession.²⁵

The States of New Hampshire, Rhode Island and Connecticut were founded under much the same conditions and circumstances as Massachusetts, and in their early colonial period debt

²² "Albany Records," VII, 406; "Hazard's Annals of Penn'a," 240.

²³ "Annals," 375; also Breviat, 59.

²⁴ "Annals," 404.

²⁵ New York was perhaps more disposed than Virginia to adopt the policies and legislation of the parent country. This was on account of the more intimate communication through commerce. Cf. McMaster, I, 303.

received a nearly similar treatment. On account of the then division of the present State of New Jersey, into East Jersey commercially dependent on New York, and West Jersey, due to the strong Quaker element of its population, under the sway of Pennsylvania, that colony had a system for the disposal of debt which was based on that of the bordering State of each respective section. As a whole their system suffered from a lack of uniformity.²⁶

Maryland's laws were more systematic, and were promulgated under the influence of toleration and charity in all human relations. There the rule was neither strict nor lax, but followed the golden mean of true justice alike to the debtor and the creditor. That colony was settled by the establishment of the capital, Saint Mary's City, in March, 1634. By a warrant of the Lord Proprietor to his brother, Leonard Calvert, the General Assembly first convened on the 25th of January, 1637. On the 13th of March of that year a bill for the payment of debts was proposed, and was passed and engrossed on the 16th. In March of the next year there was passed a complete act for the recovery of debts which corresponded accurately to the English bankruptcy measures of that period, and which may be considered the first formulated bankruptcy law on the American continent.²⁷ Jurisdiction in actions of debt was in the County Court or the Hundred Court of Kent. The complainant could sue his book account, and the Register of the Court issued a writ of chancery to the defendant commanding him to answer the bill within a reasonable time, at the latest the following session of the Court, and "to bring with him his Witness accompts and all muniments necessary for his defense upon pain of having judgment proceed against him at the said Court in punishment of his contumacie." The defendant was prohibited from paying away, selling, giving discount, releasing, or in any way disposing of any of his "Tobaccos, Cattell, corne, Servants, debts or other goods or Chattells.... untill upon triall of the cause or Satisfying the Complaint.... such attachmt be Superceded or released by a tickett from the Register or by a discharge of the plantif." If any creditors ac-

²⁶ Cf. Doyle, "The Middle Colonies."

²⁷ Proceedings and Acts of the General Assembly of Maryland, 1637-38—Sept. 1664, I, 66 et seq., original entry, Liber. C & WH.

cepted preferences or assignments from the debtor, the goods so assigned were recoverable, but the claim of such creditors was cancelled. Those indebted to the debtor were directed to retain in their possession tobacco or other goods due him, which by a writ of attachment, were turned over to the complainant. If the goods of the defendant were insufficient to satisfy the debts, writs of attachment to the several creditors were revoked, and in their stead a writ of petition was issued to the sheriff "requiring him to divide the goods and Chattells of such partie named upon the writ among the parties recovering by judgment of Court accord to the proportion of their recoveries which together with their names shall be specified severally upon the said writt (except that all debts and accompts to the Lord Proprietarie in his own immediate right without assignmt otherwise growing due then by fine or forfeiture onely shall be paid afore debts due to other Creditors and all Fees payments and contributions due to publick uses Judges and Officers by any act of assembly shall be paid before other debts and all Debts due to any Inhabitant of the province shall be first Satisfied afore forreiners debts and that all debts growing due for wine hot waters or other licquors shall be paid in the last place after all other debts are satisfied and not afore." A section of the law provided for appraisement of the goods attached by two freedmen of the county, or hundred, and thereafter sale by public outcry. "And where there is not sufficient distresse of goods the partie himself or any his Servants attached shall be either sold at an outcry or otherwise his services valued and appraised by the month as before and delivered in execution to the partie or parties recovering according to the several proportions of their recoveries to be his or their Servant so long as untill the execution be satisfied according to the rate of the parties or servants labour appraised as before and the greatest Creditor recovering shall have first execution upon the body of such partie or servant and so the rest in order according to the value of the debts recovered."²⁸ Tobacco was ordinarily legal tender at that period, but by the clause, corn, at the rate of one barrel for thirty weight of tobacco, was made

²⁸ "Proceedings and Acts of the General Assembly of Maryland, 1637-38—Sept. 1664," I, 70 et seq.

legal tender. Although this act was passed with a time limit, it was amended and continued in force for many years.

By an "Act Touching Payment of Debts," passed on March 2, 1647, contracts or other "Reckonings upon Accompt booke or otherwise then by speciality onely" of more than nine months standing were not pleadable in court. Assignments of accounts were also forbidden, unless made with the consent of the debtor.²⁹ In April 1662 the statutory limit of claims was extended to three years except in case either the creditor or debtor had been absent from the province.³⁰ A law of 1667 compelled merchants to accept tobacco in lieu of money in order to relieve the great poverty of debtors.³¹ By the year 1669 the laws for collecting debts were improved by the addition of regulations for attorneys acting for foreign claimants. The bill of that year outlined the requirements of evidence in such cases, and held any attorney who filed a suit to place a bond "to pay to the Defendt all such Costs and Charges as shall by the said Defendent be in that Cause Expended in case the plaintiffe be Cast in the suit."³² On account of the practice of creditors collecting claims more than once, in cases where the alleged debtors had lost their evidences of payment, the statutory limit was reduced to one year. Also the parity of tobacco as legal tender was placed at three and one-half pence sterling.³³ The above equitable system of laws on the adjustment of debts survived until the time of the Revolution, when the province was turned over by the original proprietors to the Confederation.

Delaware, comprising New Castle and the territory lying south of it, was acquired by Penn in 1682 by a grant of the Duke of York.³⁴ It was considered and known as "The territory of the Province of Pennsylvania" and was governed by the same

²⁹ P. R. O. "Col. Ent. Bk." No. 53.

³⁰ "Maryland Archives," I, 449.

³¹ "Maryland Archives," II, 142.

³² *Ibid.*, 211.

³³ *Ibid.*, 219 & 220.

³⁴ For an account of Connecticut, cf., "Elliot's Debates," I, 22-42 of preface. Massachusetts had in 1667 acquired Gorges' title to Maine for a trifling purchase price, and it was governed as a provincial dependency until the fall of the Massachusetts charter, but re-incorporated as a part of Massachusetts in 1691. Cf. "Maine Col. Papers, 1631"; Sir Ferdinando Gorges, "Description of New England." On the New England colonies, cf., Doyle, "The Puritan Colonies," I & II, especially the bibliography in I, and notes on pp. 11 & 12.

authority and under the same laws until 1703. After numerous jealousies and disputes, in order to establish peace, the territory was allowed the privilege of self-government. By this time its institutions had been well established, and these formed the nucleus of subsequent laws.

In his plan of colonizing Georgia, James Edward Oglethorpe, an English military officer and philanthropist, had in view the accomplishment of two of the three grand policies of the British Empire in regard to the development and most advantageous use of its territory. The New England settlers had endeavored to develop and disseminate the gospel. The purpose of subduing and controlling the natives and contesting the right of possession with France and Spain had been fairly well accomplished throughout the northern and middle colonies, but had been neglected in the south, especially in localities adjoining Spanish settlements. To accomplish this was one of Oglethorpe's purposes. The third aim, provision for the welfare of the debtor and pauper classes, "the worthless *debris* of over-civilization,"³⁵ had been wholly neglected. The colony of Georgia was established at Savannah in February, 1733 for the preëminent purpose of devoting a portion of the New World systematically and exclusively to the relief of pauperism. Shortly after the accession of George I, a mania for speculation affected all classes of English society. By the bursting of the South Sea Bubble, the realities as well as the visions of the people were blasted, and each year at least four thousand deluded and luckless captives were shut up in prison, most of them deserving of no moral blame. Oglethorpe instituted a parliamentary investigation of the condition of the debtors' prisons, and this inquiry convinced him that any permanent benefit could be effected by only a fresh start in life in the New World. The membership of the experiment was limited to about one hundred selected inmates of prisons, who were destined to become the advance guard in an asylum where the projectors dreamed of gathering "those who form the waste and wreckage of society, to form them into an industrial community isolated more or less from the world in which they have lived and failed, and to give them a fresh start, free from the evil in-

35 Oglethorpe's "Proposal."

fluences which have surrounded them."³⁶ The impracticability of the scheme had been anticipated by many. Years before, Bacon had warned against colonizing with criminals and wrote the early history of Georgia in advance.³⁷ After a brief trial, the enthusiasts surrendered to insurmountable social habits, and the settlement assumed a different complexion. The report was sent back to England that shiftless debtors do not seem to have learned to work. Oglethorpe reported that some had fled because of their debts, others from fear of the Spanish invasion.³⁸ Later the arrival of a religious element, comprised of the Salt-burgers and Moravians, recreated the colony and instituted its real success.

From the start, quite expectedly, the treatment of debt was far too mild, although experience had taught each member of the group its lesson. This was one of the influences retarding the growth of the colony. Gradually, though reluctantly, due to the British reverence for tradition, a change was wrought, and the State of Georgia began to thrive under an indulgent but more equitable treatment of debt, which was based on the English statutes as adapted to that section of America.

The early records of some of the States are ample, but diffuse and neglected. Other States are unfortunate in regard to the records of their early history, from the fact that the changes of laws, customs and manners had a hand-to-mouth character, having originated as the need for them arose. In many instances the emergency had long passed before a contingent law was approved by the representative and then in turn by the proprietor or the English sovereign. By the lessons derived from these early efforts, legislators of a later period were educated. Although this experience had no more than a temporary significance, still, many valuable ideas were then originated which

³⁶ Ibid.

³⁷ "It is a shameful and unblessed thing to take the scum of people and wicked condemned men, to be the people with whom you plant; and not only so, but it spoileth the plantation; for they will ever live like rogues, and not fall to work, but be lazy, and do mischief, and spend victuals, and be quickly weary, and then certify over to their country to the discredit of the plantation." Bacon, "Of Plantations." Perry & McMillan, Phila., 1857, p. 41.

³⁸ "Letter to the Trustees," Georgia Hist. Soc., III, 49.

have found definite and permanent place in our National bankruptcy system.

Among the original States Pennsylvania appears to have had from the time of its settlement the most clearly defined and business-like form of government. The institutions of that province had been carefully planned by Penn before any efforts were made to establish a settlement, and it had the unusual advantage of interested guidance during the life of its founder. Moreover, it was established later than any of the colonies except Georgia. The plan of government which Penn established was popular and centralized, an attribute not so advantageously possessed by the other plantations. Unlike the earlier colonies, there was no organized migration to Penn's free commonwealth; but the inhabitants, sometimes in groups, gradually made their way to it from England or from the other colonies. In 1682 Penn himself arrived in his province. The essential doctrine of the Society of Friends, of which he and the majority of the community were members, was that each man is the equal of every other, a belief favorable to that form of government which in a letter he had promised to the settlers.³⁹

As early as December, 1682, an assembly convened at Upland. In a preamble of laws with their titles was included one which prescribed the procedure by which goods could be taken in execution to pay debts. Until that time Pennsylvania had been subject to a code of laws known as *The Duke of York's Book of Laws, 1676 to 1682*. New York, New Jersey and Delaware were also under the operation of this system. The Duke ordained that, "No person shall be Arrested for any Debt or fine untill the time when the Debt or fine shall become due is expired; unless it Doth appear upon Oath, that the Debtor, doth intend to convey himself away upon purpose to avoid the Action, and defraud his Creditors; in which case also, he shall not be arrested but either by Special Warrant or warrant from one Justice of the Peace or high Sherife." He provided further that, "No man's person shall be longer imprisoned for Debt or fine than he can find Securityes for his answering the Suite, or paying the Debt. PROVIDED that no man's person shall be kept in prison for

39 "You shall be governed by laws of your own making, and live a free, and if you will a sober and industrious people."

Debt or fine, Longer than the Second Day of the next session after the Arrest these the Plaintiffe shall make it appear that the person arrested hath some Estate which he will not produce, In which Case the Court may Authorize an Oath to be Administered to the party or any one suspected to be privie in Concealing his Estate, And the Court shall also order if no Estate can be found, that the Debtor shall Satisfie the Debt by service, if the Creditor so require, as also the charge of his arrest and imprisonment."⁴⁰ All actions of debt and account were tried in the jurisdiction in which the cause of action arose. Debt or trespass under five pounds between neighbors was subject to compulsory arbitration and was not triable at sessions.⁴¹ By a statute of the Province of Pennsylvania, passed March 10, 1683, jurisdiction in cases in which more than five pounds were claimed was given over to the County Courts, which had been established, and then by appeal, if the amount were more than twelve pounds, the case was submitted to the governor.⁴² In order to avoid expense, causes involving less than forty shillings were determinable by two justices, who, upon contest, reported to the County Court.⁴³ There the case was reviewed and recorded, and if approved by this court and the governor, the decree was final.⁴⁴ According to Proud's account, the governor and his council had been constituted a court of final resort. The same year grand and petit juries were first set up in Pennsylvania upon the occasion of a counterfeiting trial in which the defendant demanded jury action. Later, in August 1720, Sir William Keith established the first Court of Chancery in the province.⁴⁵

In Penn's scheme of government there was provision for three committees to obviate the difficulties of numbers arising from the strictly democratic form of the commonwealth. The first was entitled the Committee of Plantations, the second the Committee of Justice and the third was the Committee of Trade and

40 "The Duke of York's Book of Laws," 1676-1682, p. 9.

41 "Laws of the Province of Pennsylvania, 1682-1700," p. 66.

42 Ibid., vol. II, chap. LXX, p. 129.

43 Ibid., vol. II, chap. LXXXVI, p. 131.

44 Ibid.

45 Robert Proud, "The History of Pennsylvania in North America, from the Original Institution and Settlement of that Province under the first Proprietor and Governor, William Penn in 1681, till the year 1742," etc., written 1776-80, Phila. 1797., vol. I, pp. 240-41; vol. II, pp. 32, 34, 125, 146-49.

Treasury. The activities of the third committee extended in all respects to the regulation of the trade and commerce of the province, and it was expected to investigate conditions and to make recommendations to the assembly.⁴⁶

That it was the intention of the proprietor to adopt and enforce the laws of England in the province is established beyond conjecture by an agreement entered into by Penn and the principal men of the first group setting out from England in 1681.⁴⁷ This document agrees that the laws as to slanders, drunkenness, swearing, cursing, pride in apparel, trespass, distress, replevins, weights and measures should be the same as in England, until altered by law in the province. In article XX it was provided that, "No person be permitted to leave the province without three weeks notice in the market-place, and clearness papers from a justice of the peace as to his neighbors, and those he has dealt withal." A captain carrying away such an absconder was held liable for all the debts owed by said person.⁴⁸

On May 5, 1682, the celebrated "Frame of Government of the Province of Pennsylvania in America: Together with certain Laws agreed upon in England by the Governor and divers Freemen of the aforesaid Province" contained the first specific legislation affording a remedy for debt.⁴⁹ It provided that all lands and goods should be held liable for the payment of debts, unless there be legal issue, and then all goods but only one third of the land. It was also agreed that this Frame of Government should be "further explained and Confirmed there by the first Provincial Council and General Assembly that shall be held, if they shall see meet." Pursuant to this agreement a convention assembled at Chester, October 25, 1683, which provided that, for the prevention of "differences and unnecessarie Law suits about Dealing, Be it, etc., That all Persons in this Province and the Terri-

⁴⁶ "To regulate all trade and commerce according to law." Doyle, "The Middle Colonies," 391.

⁴⁷ "Certain conditions and Concessions agreed upon by William Penn, Proprietary and Governor of the Province of Pennsylvania, and those who are the Adventurers and Purchasers in the same Province, the Eleventh of July, One Thousand Six Hundred and Eighty-one," art. XVI; cf., "Acts of Assembly of Penn'a," 1682-1742.

⁴⁸ This rule had been established by territorial Deputy-Governor Lovelace in 1672, who issued a proclamation forbidding the transportation of debtors or servants without permission, Hazard, "Annals," 395.

⁴⁹ Art. XIV.

tories thereof, shall make up their accompts once everie year, and the balance paid or passed into a bill if above foorty shillings." The refuser, upon proof of the debt and refusal, "shall have judgment against him for the debt and damages in court."⁵⁰ Another article of the proceedings of this convention outlines specific privileges of the debtor: "That no inhabitant of this Province or Territories Shall be taken for Debt before a tryall, unless hee or shee shall be about to Depart out of the same, and shall refuse to give Sufficient Baile for appearance att the next Court, or security for the Payment of the Debt, or hath not goods sufficient to be attached; And that in such Cases before any warrant off arrest be granted, the plaintiff shall solemnly Declare before those who are empowered to grant the same, That hee or shee believes in his or her conscience, that his or her cause of action is just, and his or her Declaration and evidence are ready for Tryall, if the Defendant shall pray a special Court....."

The following chapter provided for the appointment of three appraisers in each county, and that seven days after appraisement the goods were to be sold in the presence of the parties concerned, "Which shall be done openly in a publick way and manner, and the Overplus returned by the Officer to the Owner, if any be."⁵¹ Jurisdiction was placed in "Quarterlie County Courts of equitie." On the fifteenth of the same month a bill "about Country Produce to pay debts" was also enacted into law, as well as a bill "for taking Land in execution to pay debts."

During a visit of Penn to the colony in 1700, one hundred special laws were passed, but the law in relation to the payment of debts was not changed. The effect of this legislation was to codify all the laws promulgated until that time. Samuel Hazard describes the "Great Body of Laws of the Province of Pennsylvania and Territories thereunto belonging," passed at Upland, now in Chester, the seventh day of the tenth month (December) of that year.⁵² This is the draft of laws so deservedly famous

⁵⁰ "Votes of the Assembly of Pennsylvania," c. CLXVIII, p. 165.

⁵¹ "Votes of the Assembly of Penn'a, c. CLXVIII, p. 171 et seq. Abrogated by William and Mary in 1693; re-enacted the same year, cf., appendix to vol. I, also chap. 73 of "Petition of Right."

⁵² This anomaly of dates was remedied by an act of the Parliament in 1752, somewhat later adopted in America, which authorized the use of the Gregorian Calender.

for its liberty of conscience clause. A section of it provided new rules of procedure in actions of debt, and a subsequent section added a penalty for a failure to pay for a purchase.⁵³ It was also ruled "That all Lands and goods shall be Lyable to pay debts, Except where there be legal Issue, and then all goods, and one half of the land only, in case the land was bought before the debts were contracted." This enactment made two departures from prior rulings. During the governorship of Sir William Markham a similar provision had been made, but it exempted only one third of the land and paid no attention to the time when the debt had been contracted.⁵⁴ "A fuller and more satisfactorie explanation of the foregoing" decrees, "That all Lands whatsoever and houses, shall be lyable to sale upon judgment and execution obtained against the Defendant, his heirs, executors or administrators; with this Due provisoe, that the messuage and plantation with its appertinences upon which the Defendant is chiefly seated, may not be exposed to sale till the expiration of one yeare after the judgment obtained, To the intent that the owner or anie one in his behalf may endeavor the redemption of the same; and before such sale shall be made, the appraisement thereof shall be by twelve honest and Discreet men of the Neighborhood, And that after such sale and appraisement, as aforesaid, the land shall be and remain as a free and Clear estate to the Purchaser or creditor his heirs and assigns forever, as ever it was to the Debtor, *Provided allwayes* that lawful interest be allowed to the Creditor from the time of the sd Judgment obtained, untill the time of Sale or Satisfaction, *Provided also*,

53 "And be in further enacted by the authority aforesaid, for avoiding suits, if two men dealing together, be indebted to each other upon bills, bonds, bargains or the like, provided they be of equal truth and clearness, the defendant shall in his answer default what the plaintiff owes him upon like clearness." Section 48.

"And be it further enacted, that all bargains, promises and agreements, about buying and selling, being made to appear by sufficient evidence, shall stand good and firm, and such as shall violate the same, he or she shall, for every such offense, pay twice the value to the party wronged." Hazard, Samuel, "Annals of Pennsylvania, from the Discovery of the Delaware," etc., p. 619.

54 Ibid. c. CLXXXIX, p. 572.

that the Chief plantation or messuage shall be the last to be executed,"⁵⁵

From the year 1683, when the commonwealth of Pennsylvania had assumed a definite policy in the administration of the affairs of its commercial classes, there was a continuous development of the English common law principles, and an adequate adaptation to the requirements of the new commercial institutions which permits of brief and regular treatment. A chronological statement of these promulgations without any remarks will be readily understood. On January 27, 1684, a bill was passed by the Assembly which stipulated the manner and form of paying debts and limited the bail which could be exacted for the freedom of the person of the debtor. There was drafted at New Castle in the same year a definite form of procedure in suits against debtors and, upon being submitted to a vote, it was passed in the affirmative. Four years later, at Philadelphia, the bill "Relating to Land and Messuages to pay Debts, With the Restriction of one year allowed the Debtor redeeming the same," which had expired by the terms of the enactment, was again proposed for consideration, and, after amendment, re-enacted.⁵⁶ In the convention of 1692, the condition was added that, "The creditor shall take goods at appraised value, if at public sale they will not advance to more." The records of 1694 contain two references to this subject. Bill number twelve was "About continuation of the three laws, *viz.*, against usury, about the sale of intestates' Lands, and about taking Land in execution for Debt." They were passed and sent to the governor for his signature. In the same year a petition was made to Colonel Benjamin Fletcher, governor for William and Mary, to enforce the existing laws, "About debtors paying by Servitude," "About Taking Lands in

55 "Pennsylvania Statutes at Large," I, 244 et seq. A peculiar custom is noticeable in "A Petition of Right" submitted to the Assembly. "Be it enacted by the authority aforesaid, That all persons within the province or territories Contracting Debts to be paid in fresh pork, tobacco or Corn, at any particular Debtor's Plantation that shall not be Demanded by the Creditor or his assigns in the proper Seasons, as from the Last of the eighth month to the tenth of the second month, Then it shall be lawful for the Debtor to dispose of said pork, tobacco or corn, and he shall not be obliged to comply with the same until the next eighth month ensuing." "Votes of the Assembly of Penn'a" art. 76, p. 216.

56 Repealed by Bill No. 51, session of 1692.

Execution," and "About Debts under Forty shillings." Third month, twentieth day of 1698, a proviso was discussed and passed for "Preventing Frauds and regulating abuses in Trade within the Province and Counties."⁵⁷

In the Charter of Philadelphia, granted in 1701, the rule was made that, "The Mayor and Recorder for the Time being shall have and by these Presents have Power to take Recognizance of Debts there, according to the Statutes of Merchants, and action Burnel." By chapter XCIV of this document, the plaintiff was compelled to be ready the next day after swearing out the warrant for the arrest of a departing debtor with his evidence and security for the costs. Section II required that all persons of known estates refusing to pay debts be imprisoned and kept at their own expense until security or satisfaction be given. A person could not be imprisoned longer than the second day of the ensuing session unless there was proof of fraud or of the withholding of property; but if no estate were found, the debtor was compelled to satisfy the debt by servitude as the County Court directed, if the creditor so desired. Section III provided the privilege that no inhabitant could be imprisoned for debt unless he attempted to depart from the province or territory and refused to give bail for his appearance at the next session of the court. Also by this clause comity among the various counties was encouraged by ordering that execution levied from one County Court should be served by the sheriff in another county. A subsequent chapter,⁵⁸ provided, "That all actions of debt. . . shall be first heard and tried in the proper county courts by the respective justices; which county courts were directed to be held quarterly in every county of the province and counties annexed, and oftener if occasion be: which county courts shall be courts of equity, for the hearing and decreeing all matters and causes cognizable in said courts, under the value of ten pounds." An amended enactment of January 12, 1705, altered the prevailing rule by limiting to seven years the terms of imprisonment after conviction of fraud and attempted abscondence, if an unmarried

57 The punishment was imported from Great Britain about that time of the jailer branding a fraudulent debtor with a "T" (signifying thief) upon the brawn of the left thumb, before the open court.

58 Chapter C, sec. I, "Statutes at Large of Penn'a," 1700-12, I, p. 129 et seq.

person under the age of fifty-three; or to five years, if a married man and under the age of forty-six; "but if the plaintiff refuse such manner of satisfaction according to the judgment of the court as aforesaid, then in such case the prisoner shall be discharged in open court."⁵⁹

An act of March 27, 1712, first asserted the doctrine of limitation for actions of debt in that province, and established the six years period within which time must be prosecuted "all actions of detinue, trover, and replevin, . . . all actions of account and upon the case (Other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants) all actions of debt grounded upon any land right or contract without specialty, all actions of debt for arrearages of rent (except proprietaries quit-rents), . . ." Another enactment of the same date ruled that upon award of judgment against the debtor for a sum of forty shillings or less, it should be held against his body and effects. But by yielding effects to the value of the claim and costs, his body was released, otherwise "the sheriff or keeper of the goal shall receive such defendant and him safely keep till the money be paid, or satisfaction made by goods or otherwise."⁶⁰ A later amendment of this law decreed public vendue of goods within three days, and took jurisdiction of debts for less than forty shillings from the "Forty Shillings or Two Weeks' Court"⁶¹ and lodged it in the justices of the peace, where it remained for many years. Later, under the governorship of George Thomas, jurisdiction was extended to the justices for amounts under five pounds, while the period intervening between the attachment and the sale of the property was extended to ten days.

In the records of the years contained in volume IV of the *Statutes at Large of Pennsylvania* is found the first code in that State for the relief of insolvent debtors. It was promulgated February 14, 1729, and entitled "An Act for the Relief of Insolvent Debtors within the Province of Pennsylvania." Its main features are a careful imitation of contemporary English

⁵⁹ "Statutes at Large of Penn'a," I, pp. 247-50.

⁶⁰ Ibid. III, chap. CXCVIII.

⁶¹ These were synonymous colloquialisms. Cf. Lloyd, "The Early Courts of Pennsylvania."

statutes. The preamble outlined the purpose of the law to be a correction of the abuses arising from the misapplication of existing laws. One of the chief complaints was that the services of debtors were not sufficient satisfaction of debts. The enactment was "That if any person or persons charged in execution for any sum or sums of money not exceeding in the whole the sum of one hundred pounds, from and after the 23rd day of March in the year of our Lord 1730, shall be minded to deliver up to his, her or their creditors all his, her of their effects towards the satisfaction of the debts wherewith he, she or they stand charged, it shall and may be lawful for such persons to exhibit a petition to any of the courts of law within this province from whence the process issued upon which he or she or they were taken or charged in execution, and certifying the cause or causes of his, her or their imprisonment, and an account of his, her, or their whole real or personal estate, with the dates of securities wherein any part of it consists and the deeds or notes relating thereunto, and the names of the witness to the same, as far as his, her or their knowledge extends thereto." Pursuant to this petition the judges were empowered to summon the creditors before the court, to hear testimony on each side and to require the debtor to take an oath to the statement of his property. Wearing apparel and bedding for himself and his family, and tools and instruments of trade or calling, not exceeding in value five pounds, were exempted. The debtor was debarred from the benefits of the law if after imprisonment he had sold, leased or assigned any part of his lands, goods, estate, stock, money, claims, debts, etc., whereby the debtor might profit or the creditors be defrauded. If the prisoner took the oath in open court and the creditors were satisfied, the court immediately transferred the lands, goods, etc., contained in such account, or so much of them as were sufficient to pay the indebtedness, and the costs of suit and jailer's fee, by a short endorsement on the back of the petition, to the creditors or to one or more of them in trust for the rest, or to some proper person appointed by the Court in trust for all the creditors. By such endorsement title was vested.

Immediately upon such assignment the prisoner was discharged out of custody by the order of the Court, and such order was sufficient warrant to the sheriff and released him from all

liability to an action for escape. The law directed distribution of the fund among the creditors in proportion to their respective debts. If any of the creditors was not satisfied, the hearing could have been postponed, and continued objection, for good reason, entitled the claimant to detain the debtor in prison indefinitely, upon his agreement to pay and allow any amount not exceeding three shillings per week for the maintenance of the prisoner. This was payable the second day of every week. If payment was defaulted, upon application to the Court, the prisoner was discharged out of custody. Display of this discharge was a good plea against re-arrest and imprisonment of the person for any debt previously contracted. However, a person could not be discharged out of prison who stood chargeable at the suit of the Crown. Also by section IV of the act, all lands, goods, tenements, hereditaments and chattels of the prisoner, except tools, etc., to the value of five pounds, were liable to a new execution. By the authority of section V, upon the discovery of perjury and upon conviction thereof by a jury, action was *de novo*, and the person convicted suffered the pains and penalties of wilful perjury and was never afterwards to receive the benefits of the act. The jailer received a proportionate share of the fund. A subsequent section allowed one full year's rent to the land-lord, in case that it was due;⁶² and the act fully protected absent and distant creditors who had not received notice of the prisoner's application to the Court. Jurisdiction for sums of forty shillings or less was conferred on the justices of the peace, who were directed to follow the same procedure and to administer the same oath as the Courts, substituting the words "forty shillings" for the words "five pounds." If the prisoner were married, an exemption of fifty shillings was allowed, and it was further provided that, "the person of the debtor shall never after be arrested for the same debt or costs."⁶³ Section IX was directed against oppression, extortion and mulcting by sheriffs and jailers, buying at taverns and furnishing food or comforts other than those provided by law. It was also made illegal to furnish liquor to prisoners, and sheriffs could not succeed themselves in office. It was also ordered that a period of four months should

62 Section VII, art. 2.

63 Section VIII.

intervene between the petition of the debtor and the first meeting of the creditors before the Court. By the provisions of this act the law "About arrests and making Debtors Pay by Servitude" was repealed. This insolvency act was passed in final form February 14, 1729, and apparently was never considered by the Crown, but allowed to become a law through lapse of time according to the proprietary charter.⁶⁴

On the 27th of January, 1730, a petition was received by the legislature from Chester County, stating that great inconveniences arose from the operation of the law for the relief of insolvent debtors. Petitions were also received from other sections of the commonwealth. They were investigated, discussed at length and resulted in an amendment of the act. The privileges had been abused by the debtors. Unmarried persons owing small sums which could have been satisfied by servitude, took advantage of the act, by reason of which many creditors of low circumstances lost their debts and in addition were obliged to pay the costs of suit.⁶⁵ The amendment was to the effect that no person was to have the benefit of the act who owed money before the passing of the said act but was not in prison. Also, no unmarried person under forty years of age, owing less than twenty pounds could escape paying his debts by invoking the law. Such persons were liable to arrest and imprisonment as if no such law existed. Exceptions were made for relief in just cases of need, when the effects were assigned and the debtor signified his intention and willingness to make satisfaction for the deficit by service. A section denied the privileges of the act to persons not resident in the commonwealth for a period of two years or more. In case the cost of keep of a committed debtor was not paid or if his family on account of his confinement became a public charge, the justices were empowered to grant a release.

There seems to have been considerable contest over the application of this law, for, there are recorded in the acts of the as-

64 "The Statutes at Large of Pennsylvania," vol. IV, pp. 172-78. Cf. secs. I-VIII, Feb. 2, 1765, ch. 518; Sept. 20, 1765, ch. 531; Feb. 24, 1770, ch. 611; Mch. 21, 1772, ch. 645; Jan. 22, 1774 ch. 693; Ordinance passed Aug. 1, 1776, ch. 627; Constitution of 1776: "Plan of Government," sec. XXVIII; Constitution of 1790, art. IX, sec. XVI. Repealed by act of the Assembly, Mch. 26, 1814, P. L. 216, secs. IX-XIII. Cf. Acts of Assembly passed Mch. 26, 1814, P. L. 216.

65 "Acts of the Assembly of Pennsylvania," IV, 211.

sembly numerous laws providing for and directing its operation in specific cases.⁶⁶

At that period small debtors were numerous and they seem to have been much persecuted, retained in prison through spite and refused an opportunity of discharging their obligations. In 1735, for a period of three years, an act was passed "For the more Easy and Speedy Recovery of Small Debts." One of the provisions of this act exempted free-holders from suffering execution of a judgment for a period of three months after the entry of the judgment unless the plaintiff should on oath declare that by such delay the debt would be lost or the security deteriorated.⁶⁷ A provision was also added that in case of non-suit, the defendant was entitled to have reasonable costs. This amendment also exempted from being brought under the application of the law all actions of debt for rent, actions of replevin, or upon any real contract, actions of trespass on the case for trover and conversion, and also all actions in which the title of lands should in any way come into question. The law on insolvencies was amended and re-enacted May 19, 1739, for a term of three years, and again in 1742. In the session of March 7, 1745, it was again passed, and on October 29, 1748, it was confirmed as a standing law of the commonwealth by the king in council. The act was supplemented by extending its application to debts of one hundred and fifty pounds or less, and the provision for a

66 The first of these is the case of Benjamin Mayne, of Philadelphia, in 1731. "Votes of the Assembly," etc., IV, 223. Again in vol. V is found the case of Joseph Yates, a "languishing prisoner in the gaol of Philadelphia." p. 362. The amounts of these cases were unusually large. In later years the act seems to have been considerably disregarded and abused, for, in 1761 a special enactment was required to release the person of William Griffiths, of Philadelphia, who had conformed with its provisions by assigning to his creditors all his estate and that of his wife. The assembly directed that he be released on bail until the determination of the trustees be certified and recorded. Ibid. VI, 118. Also a special application was necessary to release Samuel Wallis, imprisoned and detained after fulfillment of the requirements of the law, whose debt was a bond assigned by John More to Cox & Son. In 1765 a bill was passed releasing Thomas Reilly and John Whitpane, and the same year a special bill also forced the application of the law in the cases of a group of nine prisoners. Ibid. VII, 69 & 140. Its operation was also extended to the relief of John Galbraith, who owed debts in excess of one hundred and fifty pounds. The enactment of these special bills for the relief of individual debtors was a practice in the early Congresses which was afterwards considered unjust, unpolitic and unconstitutional. Cf. Webster's "Works," VI, 25.

67 "Votes of the Assembly of Pennsylvania," VII, 291.

special term of the Court of Common Pleas upon application by any prisoner. Creditors who were dissatisfied with the statement and oath of the debtor, and insisted upon continuing him in prison, were required to pay every Monday morning any sum not exceeding five shillings per week for the support of the prisoner. If the prisoner had a wife and children seven shillings six pence was the minimum, and if the prisoner were a widow with children, the amount to be paid for support was left to the discretion of the Court.⁶⁸

The irregularities in practice under this insolvency law continued and were serious at the Revolutionary period. This is evident from a petition for release of Richard Stevens, reciting his desire to be enabled to return to Pennsylvania from New Jersey in order to earn a livelihood for his family. He stated further that he had assigned to his attorney all his assets for the use of his creditors and that his wife had forfeited her dower rights. Further evidence is found in "An Act to Oblige the Trustees and Assignees of Insolvent Debtors to Execute their trusts" passed by the assembly January 22, 1774. It was at that time refused consideration by the king, and it became law through lapse of time in accordance with the charter of the colony. By the terms of this bill, upon the establishment of the neglect of the trustees or assignees, the Court was empowered to appoint three commissioners to settle and adjust the accounts of the defaulting officers, their executors or administrators, as well as the debts or demands of the petitioners or creditors, and to settle finally and determine the shares and proportions to which each creditor was justly entitled, and in every way carry out the provisions of the laws as was the duty of the defaulting officers. Section IV of the act was aimed at debtors confining and concealing themselves, and ordered that upon so doing for a period of six days for the purpose of defrauding creditors, if the charge were supported by oath, the Court should issue a writ of attachment on the estate, lands, tenements, goods, and chattels of the debtor in the same manner as if he were absconding with the intent of defrauding his creditors.⁶⁹ Before the enactment of this

68 Ibid. VI, 335 and VII, 348.

69 "Statutes at Large of Penn'a," VIII, 383.

supplement there were fifteen provisions by the assembly for the relief of particular debtors by name.

The jubilation of the Pennsylvania colony over the *Declaration of Independence* is reflected in "An ordinance passed for the Relief of the Prisoners of the Several Gaols in the State of Pennsylvania" on August 1, 1776.

"Whereas at this time the Courts of Justice within this State are surceased, and all process and proceedings by which suits can be legally commenced, proceeded in or determined, are by the authority of the people justly and totally suppressed:

"And whereas the detaining in custody of debtors under execution who are willing to deliver up their estates for the use of their creditors, or debtors confined under mesne process who have no legal mode of entering bail in order to free their person from imprisonment is not only oppressive but can be of no benefit to creditors:

"And Whereas a total change of government by the assistance of Divine Providence has been effected within the United States, and acts of grace to criminals sometimes are granted in events of such importance:

"(Sec. 1), Be it ordained and declared by the representatives of the Freemen of the State of Pennsylvania in general convention met, That all and every person or persons imprisoned or detained in any goal within this State by reason of any process, writ or commitment for debt or any criminal offense whatever (except for capital offenses or practices against the present virtuous measures of American States or prisoners of war) be forthwith released and discharged."

A petition and statement of the case and a surrender of the assets in conformity with the previously outlined law were required, and commissioners were appointed in each county to hear these petitions and carry out in a summary manner the decree of the legislature.⁷⁰

By an act of the assembly of October 9, 1779, jurisdiction of cases involving five to fifty pounds was given over to the justices of the peace, which indicates that the number of debtors and the amount of their obligations had increased to such an extent that

70 "Acts of the Assembly of Penn'a," VIII, 383.

it was considered expedient to relieve the courts by giving an extension of jurisdiction to the justices.

Section XXVII of the constitution of the commonwealth, adopted September 28, 1776, declares that, "the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up, *bona fide*, all his estate, real and personal, for the use of his creditors in such manner as shall hereafter be regulated by law." By its provisions all prisoners were bailable by sufficient sureties, unless for capital offenses where the proof of guilt was evident or the presumption great.⁷¹

The next reference to the subject of debt in Pennsylvania is in "An Act for the Regulation of Bankruptcy" passed September 16, 1785. Here for the first time the use of the word "bankruptcy" is found in the laws of that commonwealth, and the code was a careful following of the English statutes. The philosophy of the law is expressed in section I. P. L., "To prevent wasting or secreting of the estate, and to afford an opportunity for future diligence." Section II. P. L., limited the benefits of the act to "merchants or other persons using the trade of merchandising by way of bargaining, exchange, re-exchange, bartry or otherwise, in gross or by retail, or seeking his or her trade by buying and selling, or that shall use the trade of scrivener, receiving other men's moneys or estates into his or her trust or custody, or that shall deal as a banker, broker or factor being entrusted with money, goods or effects belonging to other persons, shall [as acts of bankruptcy] depart the State, begin to keep his or her house or otherwise absent himself or herself, suffer himself or herself to be imprisoned, or his or her goods, moneys or chattels to be attached or sequestered, or depart from his or her dwelling-house, or make or cause to be made any fraudulent conveyance of his or her lands, chattels, etc., whereby the creditors may be defeated or delayed in the recovery of their debts, or being arrested for debt shall lie in prison for more than two months, or being arrested for fifty pounds or more shall escape, shall be adjudged a bankrupt." The President, or in his absence the Vice-President, of the Executive Council upon the petition of one credi-

71 "Statutes at Large of Penn'a," X, 337-44.

tor with a claim of two hundred pounds, or of three or more creditors whose claims aggregated four hundred pounds, was empowered to appoint commissioners, not exceeding five in number, to handle and administer the estate. Only debts contracted after the passage of the act were cognizable, and a bond of four hundred pounds was exacted of the petitioning creditors before the appointment of the commissioners. Section III provided for assignment, appraisement, sale and conveyance of the assets of the debtor. Section IV gave the commissioners power to collect the claims of the bankrupt and to apply them to the payment of his obligations. Requisitions of persons alleged to be in collusion and a penalty for this offense consisting of forfeiture and double the value of that involved, were also provided. By section X, if a transfer at any time previously had been made with the intent to defraud the creditors, it was in the power of the commissioners "to sell or dispose thereof in as ample manner as if the bankrupt had been actually seized thereof." Provision was also made for examination of the bankrupt and his wife or others in much the same manner as under the present system, and the commission was permitted to inspect the books and writings of the insolvent. This privilege was also accorded the bankrupt in the presence of witnesses. By virtue of section XII, upon refusal of the bankrupt to submit to an examination or fully to answer all questions, he was committed to close confinement until he conformed himself better; and, upon the discovery of wilful and corrupt perjury tending to the damage of the creditors to the amount of twenty pounds, the party so offending was indictable in any of the courts of record of the State, and being convicted thereof, he was placed in the pillory for two hours and had one of his ears nailed to the pillory and cut off. Fraudulent conveyances were punishable in the same way. If, by the consent of the owner, any goods of others were found in the possession of the bankrupt, they could have been sold by the commissioners for the benefit of the creditors as fully as if they were a part of the estate. Article XX treated the procedure of the commissioners and limited their term of service to not less than twelve months nor more than eighteen months unless extended by the President of the Supreme Executive Council, after which time any creditor was barred from claiming a share in the distribution of the es-

tate. This clause also took notice of the meetings of the creditors after public summons in the newspapers. Another section⁷² allowed the debtor to retain for his use five to ten *per centum* out of the proceeds in case the fund paid ten to fifteen shillings on the pound, such share not to exceed four hundred and fifty pounds. The bankrupt thereafter was immune from imprisonment upon any indictment for a debt contracted prior to the petition upon exhibition of the certificate of the commissioners as to conduct. The necessary wearing apparel of the bankrupt and his family was exempted from attachment. By suffering a discount of six *per centum per annum* on claims not due, such as loans, insurance, bottomree, etc., the obligee was permitted to join in the petition and to share proportionately in the distribution of the fund. The bankrupt was discharged from such securities as if the money had been due and payable before the time of his adjudication. The President of the Supreme Executive Council gave the certificate of discharge.

This was essentially an involuntary bankruptcy act, and received final approbation to operate for a period of seven years after September 16, 1785. By an act passed February 28, 1787, debtors charged in execution for rent were also brought under its jurisdiction, and an amendment in March of that year required the surrender of property in other countries before the granting of the certificate of discharge. The compensation of the commissioners was limited to five *per centum* of the fund, or a maximum of fifty pounds. The amendment rewarded the discoverer of concealed assets with five *per centum* of the proceeds, and any trustee, concealing or failing to report concealed assets for a period of ten days after the bankrupt had completed his final examination, was mulcted the sum of one hundred pounds and twice the value of the part concealed. If the bankrupt permitted false claims to be collected or had lost any part of his estate by gambling, he was not given the percentage allowance, and it was withheld in case he had borrowed money at usurious rates of interest in order to delay the discovery of his financial condition. A clause of the amendment encouraged comity with the United States, the States and foreign countries, by permitting

the arraignment of the bankrupt before the chief magistrate of any city, borough or town corporate, or any judge or justice of the peace, upon the observance of the prescribed procedure.⁷³

A bill was passed by the General Assembly of Pennsylvania, February 8, 1797, entitled "An Act to establish a System of Bankruptcy within this Commonwealth." This was four years prior to the first law of the Federal system, and contemporaneous with similar legislation in the other States. All these systems were due to the lack of a general law for the relief of the great number of cases of distress arising from losses sustained in the Revolution. Only its new and salient points will be noticed. The benefits of relief were not extended to other classes than those embraced by the prior law. The period of residence was reduced to one year, and no other acts of bankruptcy were added, although the governor of the State, for executing the law, appointed only three commissioners with no additional powers of liquidating the estate. An innovation permitted, at their first meeting, those creditors whose claims were one third in value of the total, and whose separate claims exceeded one hundred dollars, to elect assignees. The punishment of perjury was changed to a fine of one thousand dollars and two years' imprisonment, one moiety to the State and the other to the commissioner or creditor prosecuting the charge. The commissioners were given the authority in the day time to break open any private place of the adjudged bankrupt. The penalty for refusal to disclose or divulge any useful information was four years' imprisonment. Extra-territorial creditors were given the advantage of making affidavits to their accounts and then turning them over to a local attorney for collection or prosecution. Under this law the creditors had control of the discharge of the bankrupt, for the consent of two parts in three in number and value of the creditors whose separate accounts aggregated one hundred dollars was necessary, as well as the approval of the governor.⁷⁴

A general survey of the laws relating to the subject of debt in each of the original States, and a thorough study of the construc-

73 "Statutes at Large of Penn'a," XII, for the text of the law. Cf. pp. 70-86; *Ibid.*, p. 398 for the amendment.

74 From a ms. at the Library of Congress.

tive stages of bankruptcy legislation in one typical State should suffice for a clear understanding of the steps which led to the provision for a Federal law on the subject by the Constitutional Convention. It will also throw light on the sources and development of many of the principles found in the first Federal law on bankruptcies. It is only reasonable to suppose that any law on the subject in the other States was similar, for that of Pennsylvania followed, as a pattern, the only known system for relief, namely, the English statutes.⁷⁵

An early State insolvency law, and also a bankruptcy law, has been analyzed, and the fact will easily be established that at the time which is now being discussed and using in a great measure the material and experience of the States, the first Federal law on the subject was drafted.⁷⁶

75 Senator Thomas A. Jenckes, father of the bankruptcy law of 1867, said that, "At the time of the adoption of the Federal Constitution, Rhode Island had a perfect bankrupt law." "Congressional Globe," 39th cong., 2nd sess., p. 2472.

76 Cf. William Stephen, "Journal of Georgia"; Smith, "Laws of Pennsylvania, 1700-1812"; Vale's "Penn'a Digest," s. v. "Insolvency," p. 166; Pepper & Lewis, "Digest." "Votes of Penn'a Assembly, 1682-1742." (In mss. at the Library of Congress).

CHAPTER IV.

THE CONSTITUTIONAL CONVENTION OF 1787.

The lawgivers of the world had been familiar with the principles of bankruptcy jurisprudence for more than eight centuries, and for practically two hundred years the Anglo-Saxon race had legislated for the remedy and relief of the commercial debtor and the just protection of the creditor, when the delegates to the Federal Convention met at Philadelphia, May 14, 1787. Before considering the proceedings of that body of patriots on the subject of alleviation of debt, it will be interesting as well as necessary to preface with a brief sketch the trade and commercial condition of the domain under the operation of *The Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia*. The utter failure of this first constitution satisfactorily to regulate trade among the various colonies was the chief motive of the activities which resulted in a new fundamental law.¹

The *Articles of Confederation*, under which the newly liberated colonies agreed, on November 15, 1777, to be governed, contained no provision for the regulation of personal commercial relations, but was chiefly entered into for the cultivation and disposition of general trade among the States, and to provide for concerted action of all in the event of foreign attack on any member or members. Commenting on the limited operation of that form of government, Mr. Justice Story said that, under the *Articles of Confederation* the States severally possessed the exclusive right, as a matter belonging to their general sovereignty,

¹ "The inefficiency of the confederated government having been proved in war and in peace, the United States proceeded to the greatest achievement in the civil history of man, the formation of a more perfect Union, by the deliberate act and choice of the people." Bancroft, Introduction to Hunt's "Life of Livingston," p. XIV.

to pass laws upon the subject of bankruptcy and insolvency.² It is generally admitted that it did not approximate its purpose and that it failed as a fundamental law for the construction of any institution which required comity and uniformity. During the interval between the approval of the *Articles* and the adoption of the *Constitution*, the financial and industrial condition of America was most lamentable, and it was in response to the appeal for some measures of relief from the existing distress that the commissioners appointed by certain States met at Annapolis on the first Monday of September, 1786, to discuss informally the critical state of affairs and the needed political reform.

Sydney George Fisher, in establishing his opinion that commercial necessity was the greatest force influencing the architects of the *Constitution*, says, among other things, that, "As commerce increased in the course of years its regulation became of more and more importance, and in the end the necessity for this regulation was one of the most potent causes of federalism."³ In fact, the Annapolis convention of 1786 was called merely for the purpose of regulating the commerce among the States which bordered on Chesapeake Bay.⁴ Uniformity was the shibboleth of this meeting, which declined as inexpedient the limited task assigned to it and recommended at the earliest possible moment a convention of representatives of every State with powers adequate to the occasion.⁵

It has been demonstrated that the English code had, in colonial times, been carried across the Atlantic and set up on the shores of America, and the *Articles* continued the operation of the principles of that code in each State according to the established and traditional laws. The nature and extent of these laws has been amply illustrated, and it would be misleading to suggest that they ceased to operate or were changed immediately by the *Constitution*. For, owing to the failure of the Federal government to legislate on the subject, and the obstinacy of the commonwealths, whose congressmen were then more frequently laboring for the local than the general welfare, in yielding to the cen-

2 "Commentaries on the Constitution," II, 46.

3 "Evolution of the Constitution of the United States," 254.

4 Cf. *Ibid.* for a description of the period.

5 Madison, "Journal of the Constitutional Convention," vol. V of Elliot's "Debates," (1845) 109-123.

tral and sovereign power anything considered a State right, the regulation of debt remained for many years under the control and administration of the States.⁶

The plan of union entitled, *Articles of Confederation and Perpetual Union of the Colonies*, sketched by Doctor Franklin and submitted for the consideration of the Congress of the Confederation on July 21, 1775, and the basis of the report of July 12, 1777, which was adopted for the general government of the colonies, gave no power to the supreme representative of the colonies for the complete regulation of commerce and kindred matters. The general opinion is that it was purposely omitted, for, New Jersey strongly urged its amendment in that respect. The State constitutions of that period, with two or three exceptions, paid no attention to the matter of bankruptcies and insolvencies, and it was taken care of almost entirely by statute. North Carolina's constitution of December 18, 1776, probably patterned after that of Pennsylvania, (or both followed the same model) provides:

"That the person of the debtor, where there is not a strong presumption of fraud, shall not be continued in prison, after delivering up, *bona fide*, all his estate real and personal, for the use of his creditors, in such manner as shall hereafter be regulated by law." To this clause Pennsylvania added in 1790, "That no . . . law impairing the obligation of contracts shall be made."⁷ Georgia's constitution provided for Courts Merchant. The other State constitutions had no reference to the matter, although Vermont, Tennessee, and Kentucky, admitted into the Union soon after the adoption of the *Constitution*, included in their constitutions clauses similar to those of North Carolina and Pennsylvania. Thus we see the manner in which the subject of debt and

6 Even in the Convention this particularism was regrettable, for, Gouverneur Morris, who wrote the draft of the Constitution, remarked that, "The States, he found, had many representatives on the floor. Few, he feared, were to be deemed the representatives of America." Madison, "Journal of the Constitutional Convention," Elliot's "Debates," (1845) vol. V, p. 291.

7 Thorpe, "American Charters, Constitutions and Organic Laws," V. 2793. Art. XXXIV. The Articles of Confederation went into operation March 1, 1781.

8 Art. IX, secs. 14 and 17. Cf. sec. 28 of Const. of 1776, Thorpe, "American Charters," etc., V, 3089.

its relief were provided for in the period immediately preceding the adoption of the *Constitution*.⁹

In his introductory remarks to the *Journal of Constitutional Convention*, James Madison portrays the weakness of the Confederation in regard to this subject. He says, "The radical infirmity of the Articles of Confederation was the dependence of Congress on the voluntary and simultaneous compliance with its requisitions by so many independent communities, each consulting more or less its particular interests and convenience, and distrusting the compliance of the others. . . . The close of the war, however, brought no cure for the public embarrassments. In the internal administration of the States, a violation of contracts had become familiar, in the form of depreciated paper money made a legal tender, of property substituted for money, of the instalment laws, and of the occlusions of the courts of justice, although evident that all such interferences affected the rights of other States. Among the defects which had been severely felt, was want of uniformity in cases requiring it, as laws of naturalization and bankruptcy, a coercive authority operating on individuals, and a guaranty of the internal tranquility of the States."¹⁰

McMaster gives an accurate and vivid account of the conditions of the times. The crime of debt was the cause of the confinement of more men than any infraction of the law, and "the class most likely to get into debt was the most defenseless and dependent, the great body of servants, of artisans, and of laborers, those, in short, who depended on their daily wages for their daily bread. . . . The laborer who fell from a scaffold or lay sick of the fever was sure to be seized the moment he recovered, and be carried to the jail for the bill of a few dollars which had run up during his illness at the huckster's or the tavern."¹¹ While shuddering at the cruelties committed in British prison-ships, and in their indignation decreeing that the coin of the realm should be stamped with representations of such atrocities, our

9 "The Constitutions of the Sixteen States which Compose the Confederated States of America according to latest Amendments by S. Hall, W. Spotswood et als," Boston, 1797.

10 Elliot's "Debates," V. 111-12.

11 "History of the People of the United States from the Revolution to the Civil War," I, 98.

forefathers maintained countless dungeons throughout the land "where deeds of cruelty were done, in comparison with which the foulest acts committed in the hulks sink to a contemptible insignificance."¹² His description of Newgate prison, perhaps the worst in the country, and others is timely. It was an old worked-out copper mine in the hills, and the only entrance to it was by a ladder let down into a shaft. There, at one time, more than a hundred of those who were considered culprits were imprisoned, fastened by their feet with iron bars, and by their necks with chains to beams in the roof. "The darkness was intense; the cave reeked with filth; vermin abounded; water trickled from the roof and oozed from the sides of the caverns; huge masses of earth were continually falling off. In the dampness and the filth the clothing of the prisoners grew mouldy and rotted away, and their limbs became stiff with rheumatism."¹³ In every county throughout the States there were debtors' prisons unfit for the habitation of the most loathsome beasts. Northampton prison had cells less than four feet high, ventilated through privy vaults; at Worcester jail there was no means of ventilation at all, and in some of the dungeons the prisoners were lodged in hammocks swung one over the other. Philadelphia's prison, in which some of the noted patriots of the war were confined, had keeps eighteen by twenty feet in dimension so crowded that each prisoner had a space of only six by two feet in which to lie down at night. Beds and bedding, sometimes even food, were entirely lacking. Into these pits and seminaries of vice both sexes were indiscriminately thrust, "and prostitutes plied their calling openly in the presence of men and women of decent station, and guilty of no crime but an inability to pay their debts,"¹⁴ debts in a majority of cases resulting from losses and sacrifices made during the progress of the war. To be confined in such holes was not the extent of the punishment. The pillory and the whipping-post worked over-time, ears were cropped and amputated; the tread-mill turned continuously; the lash fell harshly and unmercifully on the backs of the innocent; the shears dripped with blood and the branding iron emitted the stench of

¹² Ibid.

¹³ McMaster, "History of the People of United States," I, 99 et seq.

¹⁴ Ibid.

burning human flesh. The wheel-barrow gangs could be seen daily on the streets of Philadelphia, the seat of the Congress, while in Delaware twenty crimes were punishable with death. The ravings of men and women driven to madness by such treatment were silenced by tying them up by their thumbs and flogging them until they were too exhausted to utter a groan. The sick received no attention and the death rate reached as high as sixty in the thousand. This condition is almost incomprehensible in our age; but it illustrates the suffering and distress under the operation of the *Articles of Confederation*.

Furthermore, many of the debts were owed to Tories, refusal of payment was openly made and the creditors mistrusted and driven out of the country.¹⁵ Commerce and trade throughout all but a few of the States were at lowest ebb in 1786. Forty-two millions of dollars of war debt faced the Federal Government, while in all of the States the private debts were enormous. In Massachusetts alone they totalled one million, three hundred thousand dollars. Lawyers who attempted to collect claims were treated with violence, and the profession was held in the utmost contempt. Open and armed resistance was made to actions of distress. In Massachusetts an angry mob of over a thousand for many months impeded legislation and the procedure of the courts, insisting on the abolition of all debts and clamoring for equal land rights. The state of the Union was truly critical, especially as regards economic conditions. The principles involved in Shay's Rebellion and the test case of *Trevett versus Weeden*,¹⁶ relating to Federal bills of credit in lieu of the "everlasting" currency, almost wrecked the government.

Professor Beard reviews the operation of the *Articles of Confederation* in his contention that the *Constitution of the United States* was an economic document, "originated and carried through principally by four groups of personalty interests which had been adversely affected under the *Articles of Confederation*: money, public securities, manufacturers, and trade and shipping," on the one hand as opposed to the farmer and debtor

15 "The open contempt with which, in all parts of the country, the people treated the recommendations of Congress concerning the refugees and the payment of the debts, was no more than any man of sagacity could have foretold." McMaster, I, 128 & 130.

16 Rhode Island, 1786, "2 Chandler's Criminal Trials," 296.

classes on the other,¹⁷ and adds the following in paraphrase. "Small farmers were frequently in debt to other folks for land; there were rebellions in Massachusetts by Shays and a thousand followers, maintaining equal property rights and the enforcement of the Agrarian laws; disturbances in Rhode Island and New Hampshire and other northern States; the advocates of paper money were constantly agitating innumerable schemes for the relief of the debtor, as paper money, abolition of imprisonment for debt, laws delaying collections, and exception laws, and those requiring creditors to accept land in lieu of specie at a valuation fixed by a board of arbitration."¹⁸

The philosophy of the debtors was reflected in the writings of Luther Martin, a delegate from Maryland to the Convention, who disapproved of the *Constitution* because it stopped Agrarian legislation. He wanted the States to retain the right to issue paper money and also the power to annul contracts. Martin was a champion of the extreme States' Rights view, and was democratic and far advanced for his times in matters of Political Economy. His argument was for the retention of this power for times of great public distress or calamity, to enable the States for the preservation of the most valuable part of their citizens to pass "laws totally or partially stopping the courts of justice, or authorizing the debtor to pay by instalments, or by delivering up his property to his creditors at a reasonable and honest valuation."¹⁹ Reviewing the past, he adds that, such power has been used to advantage in former years, and was likely to be more useful in the future. "The principal cause of complaint among the people at large at the time of the Convention was the public and private debts with which they were oppressed."²⁰

Daniel Webster said that, "Commerce, credit, and confidence were the principal things which did not exist under the old Confederation..... A vicious system of legislation, a system of paper money and tender laws, had completely paralyzed industry, threatened to beggar every man of property and ultimately ruin

17 Beard, "An Economic Interpretation of the Constitution of the United States," I, 325.

18 Ibid. 28.

19 "Elliot's Debates," "The Report to the Maryland House of Delegates of January 27, 1787," I, 376.

20 Ibid.

the country. The relation between debtor and creditor, always delicate, and always dangerous when it divides society . . . was in such condition . . . as to threaten the overthrow of all government; and a revolution was menaced, much more critical and alarming than that through which the country had recently passed. The object of the new Constitution was to arrest these evils; to awaken industry by giving security to property; to establish confidence, credit, and commerce, by salutary laws, to be enforced by the power of the whole community. The Revolutionary War was over, the country had peace, but little domestic tranquility; it had liberty, but few of its enjoyments, and none of its security. The States had struggled together, but their union was imperfect. They had freedom, but not an established course of justice. The Constitution was therefore framed as it professes, 'to form a more perfect union, to establish justice, to secure the blessings of liberty, and to secure domestic tranquility.'"²¹

Under the jurisdiction of the *Articles of Confederation*, the creditor classes resisted all schemes for the relief of these private and insurmountable debts, and they suffered considerable losses from the application of State insolvency laws. There was constant strife. The absence of laws protecting manufacturers in interstate and foreign dealings, lack of security in the Western Lands and contentions over their ownership, paper money, stay laws, pine barren acts, the derangement of the monetary system and coinage due to non-uniformity in standards which were, for the most part, foreign, at length turned the inhabitants to "the relief of forming a new national government, so devised as to preserve the sacredness of contracts, emitting a safe paper money and so forth for the benefit and security of trade."²² According to Beard, some claimed that the rapacity of creditors, others the depravity of debtors, was responsible for the conditions which find their institutional reflex in the bankruptcy article of the *American Constitution*.²³ Madison concisely contrasts the two forms of government. He says that, the new form is "a

²¹ "Works," VI, 34.

²² "Elliot's Debates," V, 10.

²³ "An Economic Interpretation of the Constitution of the United States," p. 32.

system founded on popular rights, and so combining a federal form with the form of individual republics, as may enable each to supply the defect of the other and obtain the advantage of both."²⁴

The result of John Fiske's careful study of this period must not be omitted. He presents new and comprehensive views. Through the interruption of commerce and the extravagant issue of paper money during and subsequent to the Revolution, debt was prevalent among the States just prior to the Constitutional Convention. In 1780 Connecticut had wisely adjusted all relations between debtors and creditors. Massachusetts and Rhode Island, then preëminently maritime colonies, were not so fortunate. Shipbuilding, oil, fisheries, lumbering and the rum industry were all destroyed. Rhode Island had too long supported the enemy's troops. "Nowhere, perhaps, was there a larger proportion of the population in debt, and in these preëminently commercial communities private debts were a heavier burden than in the somewhat patriarchal system of life in Virginia and South Carolina. In the time of which we are now treating, imprisonment for debt was common. High-minded but unfortunate men were carried to jail, and herded with thieves and ruffians in loathsome dungeons, for the crime of owing a hundred dollars, which they could not promptly pay. Under such circumstances, a commercial disturbance, involving wide-spread debt, entailed an amount of personal suffering and humiliation of which, in these kinder days we can form no adequate conception. It tended to make the debtor an outlaw, ready to entertain schemes for the subversion of society."²⁵

From the preceding authorities we can understand the condition of society under the operation of the *Articles of Confederation*, the defects and inadequacy of that form of government to regulate the commerce of the thriving republic and the need of a new system founded not on the sovereignty of the people collectively—the States, but on the people individually. A writer in the *Pennsylvania Journal* of April 24, 1775, enthusiastically boasted, "America can be as happy as she pleases, she has a blank sheet to write upon." By the year 1787 America had become a

²⁴ Ibid.

²⁵ Fiske, "The Critical Period of American History," 172.

disappointment to friends of free government. Pessimism reigned supreme; revolt and dissolution were threatened on every side; many mistakes had been made, and England was contentedly awaiting the moment when she would be supplicated to resume a protectorate over the American continent. At the opening of the Convention, the delegates, instead of having a blank sheet to write upon, were confronted with the solution of an enigma, the unprecedented task of outlining almost spontaneously a fundamental rule of conduct for a people heretofore governed by the traditions of thirteen separate and distinct communities, each influenced by its own prejudices, particular interests and aspirations.

A chapter on the discussions in the Constitutional Convention concerning the subject of bankruptcies will, of necessity, be brief, for little which has become a matter of record was said or written in regard to it. The journals are "sketchy and laconic."²⁶ Madison kept an accurate, though necessarily a concise, account of the proceedings of the Convention. He describes the unusual efforts he made to preserve a full and reliable record of all that occurred, and we may be reasonably certain that little escaped his alertness.²⁷ The Honorable Robert Yates, a delegate from New York, also took comprehensive notes and published a memorandum of the debates in the Convention, which, insofar as it refers to the subject of bankruptcies, is in complete agreement with Madison's account.

The minutes of the Convention during eighty-five working days, were occupied, for the most part, by debates on the matter

²⁶ Taft, "Constitutional Review," July, 1917, 67.

²⁷ He says, "The curiosity I had felt during my researches into the histories of the most distinguished of the confederacies, particularly those of antiquity, and the deficiencies I found in the means of satisfying it, more especially in what related to the process, the principles, the reasons, and the anticipations, which prevailed in the formation of them, determined me to preserve, as far as I could, an exact account of what might pass in the Convention while executing its trust; with the magnitude of which I was duly impressed, as I was by the gratification promised to future curiosity by an authentic exhibition of the objects, the opinions and the reasonings from which the new system of government was to receive its peculiar structure and organization. Nor was I unaware of the value of such a contribution to the fund of materials for a history of a Constitution on which would be staked the happiness of a people great even in its infancy, and possibly the cause of Liberty throughout the world." "Journal of the Constitutional Convention." "Elliot's Debates," (1845) V. 121.

of representation, the term and duties of the chief executive, the distribution of the powers of government, the organization of the National judiciary and the regulation of commerce in general, and, but little time was devoted to the subject of bankruptcies. Although the Convention had been called for the 14th of May, the 25th of that month had arrived before a sufficient number of the delegates appeared to constitute a representation of the majority of the States. They then elected George Washington their chairman and proceeded to business. On the 29th Mr. Edmund Randolph, of Virginia, presented fifteen resolutions to the Convention which constituted the celebrated Virginia plan, the nucleus of the *Constitution*. The same day Mr. Charles Pinckney laid before the Convention the draft of a federal government, both of which proposals were referred to the committee of the whole, which debated the resolutions from day to day, until the 13th of June, when the committee of the whole reported to the Convention a series of nineteen resolutions, founded, for the most part, upon those which had been offered by Mr. Randolph. On the 15th of June, Mr. Paterson, of New Jersey, submitted his resolutions which were referred to the committee of the whole, to whom were also recommitted the resolutions reported on the 13th. On the 19th the committee of the whole disapproved of Mr. Paterson's resolutions, but favorably recommended their previous report. The Convention did not again go into committee of the whole, but from the 19th of June until the 23d of July debated the nineteen resolutions which were occasionally referred to grand committees consisting of one member from each State, or select committees of five members. All except what concerned the supreme executive, together with the proceedings of the Convention and the propositions of Pinckney and Paterson, were referred to a committee of five members, called the Committee of Detail, on the 24th of June. After also referring the matter of the chief executive to this committee on the 26th, the Convention adjourned until August 6th, when the Committee of Detail reported *A Constitution for the Establishment of a National Government*. This draft was the subject of debate from that time until the 8th of September. Many additional resolutions proposed in the course of the deliberations, were referred to and finally reported by the Committee of Detail. On

the 8th of September a Committee on Style was appointed by ballot for the purpose of arranging and refining the articles agreed to by the Convention. After four days this committee reported a constitution as revised and arranged and a draft of a letter to the Congress. Printed copies were distributed to the members, which were debated until the 17th of September. On that day the draft was adopted by a question to agree to the *Constitution*, as amended, "All the States, aye."²⁸ After directing that the proposed *Constitution* be submitted to the Congress and the conventions of the delegates of the people of the several States for their assent and ratification, the Convention adjourned *sine die*.²⁹

This review is intended to furnish an understanding of the development of a majority of the articles of the *Constitution*, but the subject of bankruptcies was not considered until the latter days. The resolutions offered by Mr. Charles Pinckney, an alleged copy of which was furnished many years afterwards,³⁰ contained no reference to the matter of bankruptcies.³¹ Mr. Randolph's propositions do not contain it, as he paid most attention to the frame of government and the delineation of certain rights.³² The paper furnished by General Bloomfield, and by common consent agreed to have been Paterson's plan, does not mention the subject of bankruptcies.³³ Colonel Hamilton's plan, read by him to the Convention as containing a suitable form of government for the United States and not formally submitted to that body, does not make any reference to the matter.³⁴ Indeed, the draft reported on the 6th of August by the Committee of Detail, consisting of Messrs. Rutledge, Randolph, Gorham, Ellsworth and Wilson, did not have a clause referring to that subject. Justice Story who lived contemporaneously with the members of

28 That is, all the States represented by delegates.

29 The Constitution did not go into operation until March 4, 1789 and the contract clause did not affect laws prior to that date. Cf. Owings vs. Speed et als., 5 Wheat. 420-24. For an historical account, cf. Miller, "On the Constitution," 91. ".....and then only as to the States which had ratified it."

30 Cf. Nott, "The Mystery of the Pinckney Draft"; also, Madison, "Journal, appendix."

31 Elliot, "Debates," I, 145.

32 "Elliot's Debates," I, 143.

33 "Secret Proceedings and Debates of the Federal Convention," Wash. Govt. Printing Office, 1909, 149.

34 Cf. Hamilton's "Works."

that illustrious body of statesmen, says, "It was not in the original draft. The article first containing it came from the Committee on Style, 'To establish uniform laws on the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange.'"³⁵ The first mention of bankruptcies was made by Mr. Pinckney on the 29th of August. He then moved to commit article sixteen with the following proposition, "To establish uniform laws on the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange."³⁶ Senator Robert Y. Hayne credits John Rutledge with having been the father of the bankruptcy clause.³⁷ Mr. Gorham favored agreeing to Mr. Pinckney's motion and committing the proposition. Mr. Madison was for committing both. He recommended that the legislature be authorized to provide for the execution of judgments in other States, under such regulations as might be expedient. He thought that this might be done with safety, and was justified by the nature of the Union. Mr. Randolph said that, there was no instance of one nation executing the judgments of the courts of another nation. He moved the following proposition:

"Whenever the act of any State, legislative, executive or judiciary, shall be attested and exemplified under the seal thereof, such attestation and exemplification shall be deemed in other States as full proof of the existence of that act; and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State wherein the said act was done."³⁸

This was an effort to obtain uniformity of procedure throughout the country in all cases requiring it, as well as in bankruptcies. Mr. Pinckney's motion, together with article sixteen, was referred to the Committee of Detail. The motion of Mr. Randolph was also committed, although in the final draft it was replaced by a proposition offered on the same day by Gouverneur Morris:

"Full faith ought to be given, in each State, to the public acts,

³⁵ "Commentaries," II, 46.

³⁶ "Elliot's Debates," V, 488.

³⁷ Ibid. IV, 492.

³⁸ "Elliott's Debates," V, 488.

records, and judicial proceedings of every other State; and the legislature shall, by general laws, determine the proof and effect of such acts, records, and proceedings."

These various proposals and recommendations were considered by the Committee of Detail until the 1st of September, when Mr. Rutledge made for his committee a final report, which contained article sixteen. It was recommended to withdraw the reference to bankruptcies from that article and to insert it after the word "States" in the last line of the third page (of the printed report of the Convention) and also to add Mr. Randolph's proposition.³⁹ After some deliberation on this bill, as the result of which it was slightly amended, the clause on the subject of bankruptcies being taken up, Mr. Sherman observed, "That bankruptcies, were in some cases, punishable with death by the laws of England, and he did not choose to grant a power by which that might be done here." Mr. Gouverneur Morris said, "..... this was an extensive and delicate subject. He would agree to it because he saw no danger of abuse by the legislature of the United States."⁴⁰

On the question to agree to the clause, Connecticut alone was in the negative, therefore the vote was ten to one in the affirmative.⁴¹ The opposition of Connecticut was undoubtedly due to the fact that a Federal regulation of the subject would disturb the operation of its State law passed seven years previously. The clause separately was not discussed again on the floor of the Convention, but was adopted and signed as a part of the *Constitution* on the 17th of September. However, on the 14th, Mr. Gerry had made an effort to restrain the authorization of the Congress to pass legislation tending to the impairment of contracts, but this motion was lost.⁴²

Before stating the opinions of commentators as to what form of bankruptcy legislation was in the minds of the framers of the *Constitution*, since nothing in this respect was expressed, the attitude of the various ratifying conventions, which were, in a sense, continuations of the Federal Convention and had opportunities for ascertaining the intention of the framers, must first

³⁹ Ibid. 503.

⁴⁰ "Elliot's Debates," V, 504.

⁴¹ Ibid.

⁴² Ibid. 546.

be examined.⁴³ An amendment to the *Constitution* was proposed by the ratifying convention of New York, to the effect that the power of passing uniform laws on bankruptcies should be limited to an application to only merchants and other traders; but it did not meet favor even in that convention.⁴⁴ At the present time it is readily seen that such a limitation, or the one proposed by Mr. Gerry in the Convention, would have impaired the usefulness of this clause and would have necessitated an amendment to the *Constitution* to permit the development of the present system. The North Carolina ratifying convention, as well as Luther Martin in the Maryland ratifying convention, argued for the retention of the right of impairing the sacredness of contracts by the State legislatures.⁴⁵ The demand of the minority of the Pennsylvania ratifying convention was "That in controversies respecting property, and in suits between man and man trial by jury shall remain as heretofore, as well in the Federal courts, as in those of the several States."⁴⁶ Mr. McKean in the Pennsylvania convention made the uncontradicted statement, "That the power of Congress to regulate trade, to establish a general rule of naturalization, and to enact uniform laws of bankruptcies is not objected to."⁴⁷ The other ratifying conventions did not give this subject particular attention with the exception of the Annapolis convention of April 21, 1788, which pressed for privileges similar to those of New York, and petitioned, "That in all actions on debt . . . of which the inferior federal courts have jurisdiction, the trial of facts shall be by jury, if required by either party; and that it be expressly declared that the State courts, have a concurrent jurisdiction with the Federal courts, with an appeal from either, only as to matter of law, to the Supreme Federal Court, if the matter in dispute be of dollars."⁴⁸

43 "Journal of the Convention Supplement," 436; Story, "Commentaries," II, 53.

44 For a concise treatment of the Constitution in the various ratifying conventions, cf. Bancroft, "History of the Formation of the Constitution of the United States," II, 217-318.

45 "Elliot's Debates," IV, 150 & 191; "Secret Proceedings of the Constitutional Convention," 48.

46 Cf. Bancroft, "History of the Formation of the Constitution of the United States," II, 237-254.

47 McMaster & Stone, "Pennsylvania and the Federal Constitution," 1787-1788, 421.

48 "Elliot's Debates," II, 550.

For many years after Rhode Island, the most recalcitrant of the States, had ratified the *Constitution* and it had become a part of the fundamental law of the land, a controversy was waged between the strict and loose constructionists as to whether the *Constitution* was a crystallized document *totidem verbis*, incapable of enlargement and construction, or a thing of life, a verdant stem able to bud and blossom in response to the harsh or gentle winds of time. Many contended that it was static, possible of only that interpretation which was in the minds of the originators, which in regard to this subject was thoroughly English. For, as Luther Martin said, "We were eternally troubled with arguments and precedents from the British Government."⁴⁹ It is incontrovertible that for a model our forefathers looked across the Atlantic to the country which they knew best. The English origin of the *Constitution* can be proved by comparison with the English statutes of the period, and a biographical sketch of the members of the Convention establishes beyond question that the English pattern was always before the framers. But "the members of the Convention did not study the British statutes, nor examine judicial decisions, to ascertain the precise nature of the actually existing system of bankruptcy in England. Still less did the people of the United States trouble themselves with such inquiries."⁵⁰ That they did not purpose to restrict the new government to details, is also true. Replying to some of the American enthusiasts, Mr. Gerry said, "If we dislike the British government for the oppressive measures by them carried on against us, yet I hope we would not be so far prejudiced as to make ours in every way opposite to theirs." In the latter days of the Convention, Mr. Sherman hinted that they were following the English model when he objected to the capital punishment feature of the English statutes being made a part of the American law. The suggestion of the New York ratifying convention to limit the benefits of the proposed bankruptcy legislation to traders was also an English idea. Brandenburg confidently states, "Section eight article one was evidently suggested by the English bankruptcy statutes,"⁵¹ which at the time of the Convention di-

49 "Secret Proceedings of the Federal Convention," 37.

50 Webster, "Works," V, 7.

51 "On Bankruptcy," Introduction.

vided the general subject into two parts, insolvency and bankruptcy, administered by different courts, and upon somewhat varied principles. Insolvency laws applied to those who were imprisoned for debt and asked for discharge upon the surrender of their effects; bankruptcy related to traders only and always upon the petition of their creditors. In the latter case the person of the debtor and the debt were both discharged. Some commentators are of the opinion that the State laws referring to bankruptcies were in the minds of the framers as much as the existing laws of the kingdom. This is only another way of arriving at the same source, for the State laws were only a developed transcript of the British statutes. The Code of France is also supposed to have influenced some parts of the *Constitution*. The parts thus affected are those relating to National finance.⁵²

The influence of Montesquieu and Blackstone was great in molding the *Constitution*. The former's *De l'esprit des lois* was published in the year 1748, and "its influence in America was like Aristotle's *Politics* on the Institutions of Europe."⁵³ In 1765 Blackstone's *Commentaries*, the legal text-book of the English race, appeared, and its philosophy was well known in the colonies, and profoundly influenced American political thought.⁵⁴

All liberal minded men agree that its *Constitution* is America's principal contribution to the political progress of the world.

52 For a description of the English laws on the subject, as understood by American jurists at the time of the adoption of the Constitution, cf. the opinion of Shaw, C. J., in *May vs. Breed*, 7 Cushing, 28. This case also settled the question of comity as applying to American citizens.

53 Thorpe, "Constitutional History of the American People," I, 39. John Fiske, in his preface to "American Political Ideals," states, "The government of United States is not the result of special creation, but evolution."

54 "The first volume of the 'Commentaries' was published November 2, 1765, at a time when the thirteen colonies were just beginning to have a sense of their essential unity, and of the need of a common law. Before that time each colony had treated the law in its own way, without attention to the changes made in the sister colonies. There were differences in the organization of their courts and in their views of the relations between government and the governed, to say nothing of those produced by colonial legislation. All, or nearly all, considered the common law of England to be in force, but there few books from which the law could be learned, and few lawyers who had been able to avail themselves of instruction in the inns of court. Appeals to the king in council were not unknown; but these were too expensive, and therefore too few, to have Preface to Hammond's edition of Blackstone's "Commentaries," VII, (1890). much effect in the unification of these various systems of provincial law."

But it was not, as Herbert Spencer says, "obtained by a happy incident, not by normal progress," or as Von Holst claims, produced "as a mere experiment." The Convention which produced it was a parliament of wise men, who knew full well what they were about to do. Their motives and intentions are unmistakable. They realized the perplexities of the situation and confronted them with unprejudiced minds and with hearts determined to solve them honestly. In this spirit good institutions and beneficial doctrines were woven into the fabric of the *Constitution* without regard to the source. They had all felt the oppressor's hand. Some, it had forced to migrate to an unknown land, others, it had forced to take up arms in self-defense; and they were naturally inclined to incorporate liberal and wise provisions for the benefit of all classes in the basal law they were about to propose. Furthermore, they realized that "society is ever in a state of flux"; but also that some land-marks are permanent.

This Government is founded upon a compromise of interests, and it is illogical to suppose that it can not be adapted to the changing relations of those interests. To say that the bankruptcy clause of the *Constitution*, together with other clauses in similar circumstances, is incapable of evolution and adaptation, will, if the principle be consistently followed, arrest all political growth and refute the truism, "It is a wise generation that knows itself and its own." What has been said by Blackstone of the American *Constitution*, is applicable to this clause of the *Constitution*, "Its source and lines of development stretch far back into the past,"⁵⁵ and it is foolish to deny that what has a past can not have a future, but while it exists must remain in *statu quo*. Calm reasoning will lead to the conclusion that the bankruptcy system of the United States, while a matter of special creation in Convention times, was never intended to be an inanimate section of American juristic life, but to be capable of enlargement and extension to accommodate the convenience and need of every citizen of a great commercial republic.

55 Cf. "Universal History."

CHAPTER V.

"THE CONGRESS SHALL HAVE POWER"

According to the rules of interpretation laid down by Sir Edward Coke, great respect ought to be accorded the opinions of eminent men of the constitutional period and of the times immediately subsequent.¹ It is intended in this chapter to review the various arguments and opinions which prevailed and influenced the adoption and development of bankruptcies as a general subject of Federal legislation, capable of being modified and amended upon principles of justice, utility, expediency and general policy whenever and to whatever extent the lawmakers of the United States see fit.² An effort will be made to ascertain the intentions of the framers of the *Constitution* from the records which they have left and the writings of those who came into contact with them. This examination will demonstrate that, after contending for concurrent power by the States, the authority for making laws on the subject was surrendered to the National legislature. This was done in recognition of the intention of the framers and because it seemed to be the only solution of the difficulties which arose. The principles of law and custom upon which the States based their claim also will be noticed. After the *locus* of power has been established, some attention will be given to the extent of that power.

The answer to the question, "Wherein resides the sovereignty of the United States?" has always been the same. "It cannot too often be insisted that in the United States all political power resides in the people."³ The main struggle over the regulation

1 He says, "Great regard ought in construing a statute be paid to the construction which the sages of the law who lived about that time or soon after it was made put upon it; because they were best able to judge of the intention of the makers at the time when the law was made." Sedgwick's "Treatise," 251.

2 At a later period, Mr. Thayer, of Pennsylvania, "Believed that the powers delegated by the people to the National government were sufficient for the great work of reconstruction." McCarthy, "Lincoln's Plan of Reconstruction," 242.

3 McCarthy, "Civil Government," 10.

of bankruptcies centers on the *locus* of the sovereign power. If the Government originated as a unit at the signing of the *Declaration of Independence*, at the adoption of the *Articles of Confederation* or at the ratifying of the *Constitution*, the States could maintain no claim for a share of this supreme power. Another theory also was held. It was that the States existed as independent and distinct governments before the adoption of the *Constitution*,⁴ and at that time surrendered for the common benefit by the order of their citizens a definite portion of their sovereign power. The words and the article declaring the independence of the colonies thrilled the world "in the name and by the authority of the good people of these colonies."⁵ This declaration marked the transition of the inhabitants of America from colonists of England to an armed and war-waging unit struggling for common rights against a common oppressor, and, "From the Crown of Great Britain the sovereignty of their country passed to the people of it."⁶

There are many opinions of eminent statesmen and lawyers which justify the above statement. As a general principle of international law, "In the republican [form of government] the people in a body possess the sovereign power."⁷ And that this principle was known and applied is evidenced by the second article of the *Virginia Bill of Rights* of June 12, 1776, "That all power is vested in, and consequently derived from, the people."⁸ A learned judge analyzed the situation thus, "Its [the government of the United States] powers are granted by them [the people], and are to be exercised directly on them, and for their benefit."⁹ Daniel Webster argued in harmony with the provisions of the *Constitution* when he said, "The National govern-

4 "The States existed as independent sovereignties before even the Union was formed." Mr. Justice Clifford. "Papers in the Office of the Clerk of the Circuit Court of the United States," Boston.

5 "The Declaration of Independence." "The Constitution of United States was ordained and established, not by the United States in their sovereign capacities, but, as the preamble declares, by the people of the United States." *Martin vs. Hunter's Lessee*, 1 Wheat. 304, 380.

6 Jay, C. J., II Dallas, 470 et seq. "When the States threw off their allegiance to Great Britain, they became independent of her and of each other." Luther Martin, "Elliot's Debates," I, 423.

7 M. D'Alembert, "An Analysis of Montesquieu's Spirit of the Laws."

8 "Code of Virginia 1849," 32.

9 Marshall in "McCulloch vs. Maryland," 4 Wheat. 405.

ment possesses those powers which it can be shown the people have conferred on it and no more. All the rest belongs to the State governments, or to the people themselves."¹⁰

According to Grotius, "Sovereign power is perfectly or completely independent of any other human power, inasmuch that its acts cannot be annulled by any human will other than its own."¹¹ And this statement of *Jura Summi Imperii* is more closely connected with the subject of bankruptcy legislation, a commercial matter, by the authority of Bouvier, "That one of the rights of Sovereignty is the power to regulate commerce,"¹² a right which the sovereign people of America completely delegated to their Congress, "Properly speaking, the representative of the great body of the people of North America."¹³

During the struggle for liberty and until the successful issue of the Revolution and the adoption of the *Articles of Confederation*, there was no centralized form of government. By that compact among the communities with a novel and peculiar status, according to Chief Justice Marshall, "We were divided into independent States, united for some purposes, but in most respects sovereign."¹⁴ Continuing, he said, "These States could exercise almost every legislative power, and among others that of passing bankrupt laws. When the American people created a National Legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed not from the people of America, but from the people of the several States."¹⁵ The repository of the sovereignty of the American people has been clearly defined by these authorities, and it was this paramount authority which, after solemn deliberation, delegated a definite portion of its rights by an organic law to the Congress of the United States.

There is convincing evidence of the transfer of power by even the most enthusiastic champions of States' rights. John C. Cal-

10 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." 10th Amendment. Webster, "Works," III, 322.

11 Austin, "Province of Jurisprudence Determined," I, 189.

12 "Law Dictionary," II, 537, i. e. Inter-state Commerce.

13 Witherspoon, "Works," LX, 73.

14 *Sturges vs. Crowninshield*, 4 Wheat. 122-208, (1819).

15 Cf. Thorpe, "A Short Constitutional History of the United States," 163.

houn said, "The general government is one of specific powers; and it can rightfully exercise only the powers expressly granted, and those that may be necessary and proper to carry them into effect."¹⁶ Jefferson Davis' opinion will be interesting as well as weighty. In a speech delivered in the United States Senate, August 13, 1850, Mr. Davis said: "This, sir, is a Union of Sovereign States, and under a compact which delegated certain powers to the General Government, and reserved all else to the States respectively, or to the people." In the course of his decision in the famous case, *Dred Scott versus Sandford*, Chief Justice Taney, an advocate of States' rights and the strict construction of the *Constitution*, referred to the paramount powers of the Congress.¹⁷ In regard to the Congress of the Confederation he said: "It was little more than a congress of ambassadors, authorized to represent separate nations, in matters in which they had a common concern. . . . It must be borne in mind that the same States that formed the Confederation also formed and adopted the new Government, to which a large portion of their former sovereign powers were surrendered. . . . The principle upon which our governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by the general government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States."¹⁸ Contrasting the two forms of government, Webster characterized the Confederation as, "A compact; the States, as States, were parties to it,"¹⁹ while, after the approval of the *Constitution*, he said, "The States are unquestionably sovereign, so far as their sovereignty is not affected by this supreme law."²⁰ President Buchanan designated the Federal government, "A grant from the States to Congress of certain specific powers."²¹ The Geographical Dictionary of

16 "Works," VI, 2.

17 19 Howard 393, (May 1854).

18 "U. S. Sup. Ct. Reports," bk. 15, pp. 713, 718.

19 "Works," III, 346.

20 Ibid. 321.

21 "Inaugural Address."

the World for the year 1866, in analyzing the Civil War controversy, states that, "The government of the United States is a confederation of various States, delegating a portion of their power to a central government, whose edicts and laws, so far as granted constitutionally, are always paramount to State authority; but all powers not expressly conceded by that Constitution are tacitly reserved to the States."²² This statement of the case is completed by the words of Edward Everett declaring that the *Constitution* distributed the powers of government, "reserving to the separate States all the political functions essential to local administration and private justice, bestowed on the general government those, and those only, required for the service of the whole."²³ And finally we have the text of the *Constitution*, in which these powers are stated and defined.²⁴ Political science, however, maintains, and with perfect propriety, that the attribute of sovereignty is not divisible. No attempt will be made, at this time, to reconcile the incongruity between theory and actuality in this country.

Section eight of article one of the *Constitution* enunciates twenty-six functions of government which by the proposal of the Convention and the consent of the sovereign people their Congress has power to control. The adjective "exclusive" was not expressly used in the entire section except in reference to the imparting of exclusive legislative power in all cases affecting the government of the "ten Miles Square," and Government property within the confines of the States. But to-day no one denies that it was implied in respect to most of them. Some of the provisions of this section can never be properly administered by more than one authority and the object sought in procuring a new *Constitution* was to put others of this group under the direct

²² P. 1997.

²³ "Speeches," I, 167.

²⁴ Sumner's State Suicide Doctrine was that, "A territory by coming into the Union becomes a State; a State by going out of the Union becomes a Territory." "Congressional Globe," Dec. 19, 1866; Brownson, "American Republic," 308.

The Honorable Garret Davis, of Kentucky, introduced a series of eight resolutions. "Of these the first asserts that the rights, privileges and liberties which the Constitution assures to the people of the United States are fixed, permanent, and immutable through all the phases of peace and war, until changed by the power and in the mode prescribed by the Constitution itself." McCarthy, "Lincoln's Plan of Reconstruction," 210.

and exclusive supervision of the Congress. In regard to some of them the undivided jurisdiction of the legislature of the United States has never been brought into question, but few of the subjects have been uncontested. At different times attempts have been made by the States illegally to collect taxes and to levy imposts; they have made commercial regulations with foreign nations; issued bills of credit and endeavored to constitute and control the courts; they have participated in unwarranted warfare, rebelled and resisted the just commands of the Union, and a most persistent struggle was made by many of the States to retain concurrent, if not exclusive, control of the administration of the affairs of their insolvent and bankrupt citizens.

The obvious purpose of the architects of the *Constitution* in this section was to confer complete control on the Congress of any power which contributes to the benefit of commerce in general. Pursuant to this scheme, the States were to surrender to the Congress all powers and privileges pertaining to international and interstate trade, commercial credit appertaining thereto and public or National credit, and to retain the remainder. The *Constitution* was designed to occupy National ground in those matters in which the general or National welfare requires that it should, and in all matters of this character the laws to be promulgated by the Congress were agreed to be a part of "the supreme Law of the Land; . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding."²⁵ Thus, for the benefit of commerce, the Congress was given the power to lay and collect taxes in order to acquire the revenue for protecting the coasts, ports and shipping interests of the country at large. The power to borrow money on the credit of the United States was undoubtedly granted to permit National expansion and provide for National defense, while the following clause, in regard to trade with the Indian tribes, is considered by many to

25 Art. VI, sec. II. "The framers of the Constitution must be understood to have employed words in their natural sense, and to have intended what they said; and in construing the extent of the powers which it creates, there is no other rule than to consider the language of the instrument which confers them, in connection with the purposes for which they were conferred." *Gibbons vs. Ogden*, 9 Wheat. 240.

"A Constitution," said Chief Justice Marshall in *Cohens vs. Virginia*, 6 Wheat. 377, "is formed for ages to come, and is destined to approach immortality as nearly as human institutions can approach it."

have been put into the hands of the supreme legislature in order to secure uniformity of treatment and an equal distribution of the benefits of that trade. The power to coin money, thus furnishing a standard of values and a medium of exchange for use in fulfilling contracts, was an advantage attainable only by Federal control; as likewise the safe-guarding of this function of government and all business dealings by the provision for the punishment of counterfeiting. For this general scheme one authority for appraising the value of foreign coins was also necessary. Post offices and post roads were recognized as incalculable aids to trade, as well as the privilege of patents and copyrights, the rewards for ingenuity and industry. To protect commerce on the sea, the Congress was invested with the power to punish piracies, felonies and offenses against the law of nations; and one of the motives for maintaining a standing army and militia was to protect commerce.

The ratifying convention of Connecticut, which approved the *Constitution* January 9, 1788, by a vote of one hundred and twenty-eight to forty, did so under the impression that the restraint on the legislatures of the various States respecting the emission of bills of credit, the making of anything but money a legal tender in payment of debts, or the impairing the obligation of contracts by *ex post facto* laws, was considered necessary by the Constitutional Convention as a security to international and interstate commerce.²⁶

In the tenth section of the first article these functions are just as positively withdrawn from the States. The power of legislating on the subject of bankruptcies is delegated, for the benefit of general commerce, to the National legislature, and thus by implication denied to the States. This is accomplished by clause four of section eight, and in section ten the power to pass an ade-

²⁶ Cf. Bancroft, "History of the Formation of the Constitution of the United States," II, 217, 255, 393. This author declares: "The dignity and interests of United States demanded a grant of power to the general government for the regulation of foreign as well as domestic trade. The Convention accepted unanimously the proposition to grant to the majority of the two branches of Congress full power to make laws regulating commerce and navigation." Randolph, representing the feeling of the Southern States, and at that time governor of Virginia, was so much dissatisfied that he expressed a "doubt whether he should be able to agree to the Constitution." Elliott's "Debates," I, 491.

quate law on the subject is withdrawn by the agreement that no State shall pass "Any *ex post facto* Law, or Law impairing the Obligation of Contracts, . . ." ²⁷ Webster expresses an opinion on this policy. After emphasizing the doctrine that constitutions are made to restrain governments, while laws are made to restrain individuals, he continues: "The design [of the *Constitution*] was not so much to prevent injustice or injury in one case, or in successive single cases, as it was to make general salutary provisions, which, in their operation, should give security to all contracts, stability to credit, uniformity among the States in those things which materially concern the foreign commerce of the country, and their own credit." ²⁸ Therefore, by the terms of the grant to the Congress and the inhibitions by the tenth section on the States, the Commonwealths are restrained from all violations of contracts, the emission of paper money, making property acceptable for the discharge of debts, distant instalments, as well as the releasing of a debtor from the legal obligation to pay his debts. The general object sought was the guarding of the sacredness of all contracts.

James Wilson, a member of the Convention from Pennsylvania, summed up the entire transaction by which the Congress acquired legitimate and supreme control of this subject of jurisprudence, as follows:

"The Declaration of Independence preceded the State constitutions. What does this declare? In the name of the people of these States we are declared to be free and independent. The power of war, peace, alliances and trade, are declared to be vested in Congress."

Mr. Hamilton replied:

"I agree to Mr. Wilson's remark. Establish a weak government and you must at times overleap the bounds. Rome was obliged to create dictators. Cannot you make propositions to the people because we confederated on other principles? The people can yield to them if they will. The three great objects of government, agriculture, commerce, and revenue, can only be secured by a general government." ²⁹

²⁷ Constitution. Cf. McCarthy, "Civil Government," 92 et seq.; Von Holst, "Constitutional Law of the United States," 232 et seq.

²⁸ "Works," VI, 25; cf. The Trustees of Dartmouth College vs. Woodward, 4 Wheat. 518, 715.

²⁹ "Secret Proceedings of the Federal Convention," 96.

The origin and present possession of the power of legislating on the subject of bankruptcies has been explained. In *Sturges versus Crowninshield*, Chief Justice Marshall made the statement that the assumption is not objected to that the power of the Congress over this subject "is unlimited and supreme"; and the doctrine in that case established that in a perfect and adequate form it is "exclusive."³⁰ Webster, debating the law of 1841, expressed the opinion that the grant on the subject of bankruptcies is not an inferred or constructive power, but one of the express grants of the *Constitution*. "There may be questions about the extent of the power, but there can be none of its existence."³¹ The *Constitution* is a collection of generalities and every power given to the Congress is necessarily supreme, ". that the power is both unlimited and supreme is not questioned. That it is exclusive is denied by the counsel for the defendant."³² Although the Chief Justice ruled that the subject of bankruptcies is not such as requires that it be exclusively in the hands of the Congress, and also that the States reserved a dormant power, he laid down the rule *obiter dicta*, "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State legislatures as if they had been expressly forbidden to act on it."³³ To the question whether the subject of bankruptcies is such an exclusive power, he gives a negative answer. This case also decided that the law of a State, in that instance New York, is valid in the absence of a Federal law on the subject, that is, if no provision of the State law impairs or invalidates the obligation of the contract. The act of the Congress of the Nation creates a temporary disability on State legislatures; the power of the States is not extinguished, but only suspended, and revives during a period of Federal inactivity. A State law which entirely or almost entirely discharges a contract, he considered to impair it.

³⁰ 4 Wheat. 122.

³¹ "Works," V, 4.

³² *Sturges vs. Crowninshield*, 4 Wheat. 122. The contention of the defense was overruled by the court.

³³ *Ibid.* Cf. *Adams vs. Story*, 6 "Hall's American Law Journal," 474; Von Holst, "Constitutional Law of United States," 52, note; also note at the end of *Barron vs. Mayor and City of Baltimore*, 7 Peter's 243; Benton, "Thirty Years in the United States Congress," II, 229-40; Webster, "Works," V, 8-11 and VI, 25 et seq., his argument in *Ogden vs. Saunders*.

This judgment was confirmed in *Ogden versus Saunders*.³⁴ The former case decided that a feature of the State law which impairs a contract entered into before the enactment of the State law is unconstitutional; and the latter ruled that a State law which discharges from the obligation of a contract made after the enactment of the State bankruptcy law and with it as an implied part of the contract is in conformity with the *Constitution*.³⁵ In *Sturges versus Crowninshield*, the Supreme Court was unanimous; from the latter decision Marshall and Story dissented, and although for many years the doctrine of *Ogden versus Saunders* prevailed, it is now generally recognized that in this, as well as all constitutional decisions in which he participated the great interpreter of the *Constitution* held the correct view. However, Marshall accepted the majority ruling in *Ogden versus Saunders*, and in *Boyle versus Zacharie* and *Turner*, announced that the principle of the former case must be considered the settled law of the court.³⁶ These linked decisions constituted "a great bulwark against popular effort, through State legislation, to evade the payment of just debts, the performance of obligatory contracts, and the general repudiation of the rights of creditors."

In each of the above cases the Chief Justice held to the opinion that, "It does not appear to be a violent construction of the *Constitution*, and is certainly a convenient one, to consider the power of the States as existing over such cases as the law of the Union may not reach."³⁷ This view of the *Constitution* permits of an apparent non-uniformity in the guise of State exemption laws affecting the procedure and administration of the Federal laws in the different States. Just as the *Constitution* is a part of the constitution of each State,³⁸ but does not forbid any extension or

34 12 Wheat. 213-369.

35 A bankruptcy law passed before the execution of a contract is an implied part of it. *Ogden vs. Saunders*; *Baldwin vs. Hale*, 1 Wall. 223.

36 Justice Washington, in *Golden vs. Prince*, 3 Wash. C. C. R. 313, had ruled that the Congress had exclusive power to pass bankruptcy laws; but *Sturges vs. Crowninshield* and *Ogden vs. Saunders* corrected this judgment and qualified the relation between the Federal and State governments on this subject. Cf. Story, "Commentaries," I, 343 et seq.; Kent, "Commentaries," (12th edition) I, 388, note; and *ibid.* 456, note a; and *ibid.*, 390, note c.

37 *Sturges vs. Crowninshield*, *supra*.

38 *Herron vs. Superior Court*, 68 Pac. Rep. (Calif.) 814; in *re Winternitz*, 4 B. R. 127; *Clark vs. Ray*, 1 Har. J. 318; in *re Shepardson*, 36 Conn. 289.

addition which is not incongruous, so the bankruptcy code of the Union is capable of adaptation in this respect when expedient or demanded by local conditions.

Marshall did not deny circumscribed power to the States, but the power which he believed that the *Constitution* allotted to them was limited to the creation of insolvency laws. He said: "It is not the mere existence of the power, [to enact a comprehensive bankruptcy law] but its exercise, which is incompatible with the exercise of the same power by the States."³⁹ In the bankruptcy case reported in the fifth volume of Wheaton's reports, the Supreme Court says, "The powers granted to Congress are not exclusive of similar powers existing in the States, unless where the Constitution has expressly in terms given the exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. But in the case of concurrent authority, where laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union being the supreme law of the land, are of paramount authority, and the State laws, so far, and so far only, as such incompatibility exists, must necessarily yield."⁴⁰ Representative Mills, of Massachusetts, had enunciated this doctrine in 1818, which Marshall emphasized the next year in his interpretation in *Sturges versus Crowninshield*. The Federal law is paramount and exclusive of all bankruptcy and insolvency laws which are inconsistent with it. However, a State law may be created, or amended during the existence of a Federal law, and upon the repeal of the general law begins to operate.⁴¹ The enactment of a Federal bankruptcy law can not extinguish the pre-existing right of a State to pass a law which does not impair the obligation of contracts. It can be suspended only by the enactment of a general law. The repeal of that general law, it is true, can not confer the power on the States; but it removes a disability to its exercise which was created by the act of the Congress. Furthermore, the laws of the States may apply in such cases as the laws

³⁹ *Sturges vs. Crowninshield*, *supra*.

⁴⁰ Dillon, "Marshall's Decisions," p. 49, and appendix p. 162.

⁴¹ This is confirmed by subsequent decisions; *Parmenter Mfg. Co., vs. Hamilton*, 1 N. B. N. 8; in *re Bruss-Ritter Co.*, 1 N. B. N. 39; in *re Rouse, Hazard & Co.*, 1 N. B. N. 75; in *re Curtis*, 1 N. B. N. 163; *Chandler vs. Sidle*, 10 N. B. R. 236.

of the Union may not reach.⁴² A State law's application is not extra-territorial unless the parties to the suit submit to it. Each State has the power by the general law, so long as it does not impair the obligation of contracts, "to regulate the conveyance and disposition of all property, real or personal, within its limits and jurisdiction."⁴³

Here it is proper to distinguish laws on bankruptcies from those on insolvencies, and to call attention to the fact that the States were not stripped by the *Constitution* of the power to pass insolvency laws or to construe such laws by their courts. The scope of a bankruptcy law, in the period in which the *Constitution* was written, was to distribute the assets of a debtor among his creditors, and to discharge him from the liability of having his future acquisitions attached at the instance of his creditors for the unsatisfied portion of his debts. An insolvency law, on the other hand, operated upon the petition of the debtor to liberate his person from prison in which he had been confined by the process of State laws for the collection of debts.⁴⁴ Under the State laws the imprisonment had been authorized, and the States were eminently empowered to abrogate a penalty which they had inflicted. This the *Constitution* did not notice, and it was within the rights of the States to pass such legislation. Marshall in noticing this fact, was of the opinion that the Congress possessed this power of releasing from prison, which it afterwards exercised in the Federal bankruptcy system. These State insolvency laws served to liberate the person of the debtor from prison, but the obligation to pay remaining debts was not removed. To bankruptcy laws of this sort, really only insolvency laws, Marshall said, "The Constitution is not opposed."⁴⁵ It was not in-

42 "State laws are suspended during the operation of a Federal law." *Parmenter Mfg. Co., vs. Hamilton*, supra; in *re Bruss-Ritter Co.*, supra; in *re Mason Sash, Door & Lumber Co.*, 112 F. R. 323; *Littlefield vs. Gray*, 8 A. B. R. 409; *Hanover Bank vs. Moyses*, 186 U. S. 181; *Ogden vs. Saunders*.

"But is it not repealed thereby." *Lavender vs. Gosnell*, 12 N. B. R. 282; in *re Everett*, 9 N. B. R. 90; in *re McKee*, 1 N. B. N. 139.

"And can be amended in the meantime." In *re Wright*, 1 N. B. N. 428; in *re Worcester Co.*, 102 F. R. 808; *Butler vs. Coreley*, 146 U. S. 303. Cf. *Story*, "Commentaries," II, 322.

43 Cf. *Brandenburg*, "On Bankruptcy," 6.

44 Cf. *Dillon*, "Marshall's Complete Constitutional Decisions," 234.

45 *Ibid.* 243.

tended that there should be no relief afforded unfortunate debtors which should release them from prison, for such inhuman attitude could not be imputed to the patriots who framed the *Constitution*. Since the Federal government has in an adequate degree made this a feature of the National system, and State laws on release from imprisonment are unnecessary. A further distinction between the two forms of legislation is found in the fact that prior to the enactment of 1841, a bankruptcy law could not commence to operate at the application of the debtor, that is, it was always involuntary; while insolvency laws always operated upon the application of the debtor.⁴⁶

The intent of the provision is further established by the incapacity of the common law disposition of the State courts, by *lex loci contractus*, to summon to its tribunals the citizens of other States.⁴⁷

Therefore, it is clear that the Federal Government alone has power to enact what we to-day consider an adequate system of bankruptcy laws. If the Federal Government excepts from the embrace of its law either in express terms or by necessary implication, a class of cases, it must be considered that the Congress did not intend to interfere with the jurisdiction of the States over that class of cases. Hence, State laws operate in all cases not covered by or subject to the provisions of the law of 1898 or one of the amendments to it. The bankruptcy law does not now suspend the ordinary laws for the collection of debts,⁴⁸ for the arrest or conviction of absconding or fraudulent debtors, for the prevention of fraudulent assignments,⁴⁹ in regard to the insolvency of

⁴⁶ According to the opinion of the Judge in *Kunzler vs. Kohaus*, 5 Hill 320, "The meaning of bankruptcy was co-extensive with insolvency" and "it was especially equivalent to that word when the Constitution was adopted." A subsequent case, *Martin vs. Berry*, 37 Cal. 222, differed with the view in *Kunzler vs. Kohaus*.

⁴⁷ A discharge from a State court by virtue of a State law has no extra-territorial force. *Ogden vs. Saunders*, *supra*; *Denny vs. Bennett*, 128 U. S. 489.

Also a discharge under the bankruptcy law of a foreign country is not a bar to an action here. *McMillan vs. McNeill*, 4 Wheat. 209.

Unless the parties voluntarily submit to the suit. *Clay vs. Smith*, 3 Peter's 41; *Denny vs. Bennett*, *supra*.

The following cases also treated the extra-territorial affect of a discharge in bankruptcy; *Baldwin vs. Hale*, *supra*; *Gillman vs. Lockwood*, 4 Wall. 409; *Boyle vs. Zackarie and Turner*, 6 Peter's, 635.

⁴⁸ *Chandler vs. Siddle*, 10 N. B. R. 236.

⁴⁹ *In re Scott*, 1 N. B. N. 265.

persons under legal disability, as lunatics, minors and spend-thrifts,⁵⁰ or laws protecting the debtor from imprisonment.⁵¹

As in the case of every other important topic of the organic law, this subject was interpreted in a strict or in a loose manner, according to the convictions or desires of the authorities. The liberal view in interpreting this clause, as well as the *Constitution in toto*, has prevailed, and the power of the Congress has been generally considered commensurate with the wants of the people.

From a constitutional viewpoint, there are two principles of the bankruptcy law which were the causes of contention; the endeavor to obtain uniformity of the laws, and the impairment of the contract by the discharge of the obligation without fulfillment. The power of the Congress was granted to it by the *Constitution* and the grant is founded on expediency. There are no limitations on the legislative department of the Government in regard to the impairment of contracts and the repudiation of debts except that of uniformity of administration, and those which the policy of the Nation or the general welfare imposes.⁵² This has long been generally admitted. Mr. Tyler, of Virginia, argued for the discretion of the Congress in his reply in the House to the assertion that it was the duty of that body in every instance in which the *Constitution* gave power, to exercise it. He said:

"The gentleman's position leaves us no alternative. Our discretion is taken from us—our volition is gone. . . . Inasmuch as the Constitution confers on Congress the power to adopt a uniform system of bankruptcy,—according to his doctrine, we are not to enquire into the expediency of adopting such a system, but must yield it our support. . . . What, sir, is the end of all legislation? It is not the public good? Do we come here to legislate away the rights and happiness of our constituents, or to advance and secure them? Suppose, then, by carrying into ef-

⁵⁰ Mayer vs. Hellman, 91 U. S. 496.

⁵¹ Sullivan vs. Heiskell, Crabbe U. S. Dist. Ct., 525.

⁵² In re Silverman, 4 N. B. R. 173; In re Duerson, 13 N. B. R. 183. The opinion is expressed, obiter dicta, in Evans vs. Eaton, 1 Peter's C. C. R. 322, "There is nothing in the Constitution of the United States which forbids Congress to pass laws violating the obligation of contracts, though such power is denied to the States individually."

fect a specified power of the Constitution, we inflict serious injury upon the political body; will gentlemen contend that we are bound by a blind fatality, and compelled to act? Sir, such a doctrine cannot be supported..... The powers of this *Constitution* are all addressed to the sound discretion of Congress. You are not imperatively commanded, but authorized to act, if by so doing the good of the country will be promoted."⁵³

President Buchanan said on this subject:

"..... power and duty are very different in their nature. Power is optional; duty is imperative. The language of power is, that you may; that of duty, you must. The *Constitution* has, in the same section and in the same terms given to Congress the power to declare war, to borrow money, to raise and support armies, etc. Will any gentleman, however, undertake to say that we are under the obligation to give life and energy to these powers, by bringing them into action? Will it be contended, because we possess the power of declaring war or of borrowing money, that we are under the moral obligation to embroil ourselves with foreign powers, or load the country with a National debt?"⁵⁴

"Power, whether vested in Congress or in an individual, necessarily implies the power of exercising the right of sound discretion. The Constitution was intended not only for us, and for those who have gone before us, but for the generations yet to come. It has vested in Congress ample powers, to be called into action,⁵⁵ whenever, in their sound discretion, they believe the interest or the happiness of the people require their exertion. We

53 Elliot, "Debates," IV, 471.

54 Speech in the House, March 12, 1822.

55 "A thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." Mr. Justice Swayne, in *Smythe vs. Fiske*, 23 Wall. 374.

"A thing which is within the intention of the makers of a statute is as much within a statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." Chief Justice Thompson, Sup. Ct. N. Y. in *People vs. Utica Ins. Co.*, 15 Johns. 358.

Needless to remark, the Constitution is a fundamental statute. The opposite construction to the above is held in *United States vs. Kirby*, 7 Wall. 482.

are, therefore, left to exercise our judgment on this subject, entirely untrammelled by any constitutional injunction."⁵⁶

The exercise of this right has never been directly challenged. It seems that the seceding States considered that the sovereign power could not be extended to pass a law obliterating debts contracted before the passage of the law, that is, a law could be only prospective in its application. They appreciated the benefit of uniform laws on the subject of bankruptcies. A draft of a constitution, which was adopted unanimously at the capital, Montgomery, Alabama, March 11, 1861, reads in regard to this subject:

"The Congress shall have power to establish uniform laws on the subject of bankruptcies, throughout the Confederate States; but no law of Congress shall discharge any debt contracted before the passage of the same."⁵⁷

Investigation shows that in regard to some legislative and administrative parts of the government, there are express prohibitions or restraints on the States, such as declaring war, making peace, coinage, naturalization and the impairing of contracts. In respect to other powers a grant was made to the Congress without a concomitant prohibition on the States, and the general deduction is that in the absence or inoperation of a Federal law promulgated under such a grant, the States could legislate on the subject. While there is no restraint on the passing of a bankruptcy law by the States, clause one, section ten of article one limits the scope of such a law, and renders an adequate State law on bankruptcy impossible through lack of ability to discharge the unfulfilled contract.⁵⁸

The attainment of uniformity of the provisions for the relief of bankrupts and of the administration of the laws was the battle ground in the early years of the Nation's history. This

⁵⁶ Marshall discussed, in a general way, extension of the power when he said, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are proper, which are plainly adapted to that end, which are not prohibited, but which consist with the letter and spirit of the Constitution, are constitutional." *McCulloch vs. Maryland*, 4 Wheat. 421. Cf. for further discussion.

⁵⁷ Richardson, "Messages and State Papers of the Confederacy," (1900) I, 42.

⁵⁸ Marshall puts limitations on the doctrine when he says, in effect, that it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the State has not been expressly prohibited. Dillon, "Marshall's Decisions," 232.

came about, not as a direct issue, but as one of the principal arguments for and against exercise by the Congress of its prerogative when it saw fit, or desired to demolish the structures which the States had preserved from colonial times or had reared during periods of Federal apathy. The struggle has always been unequal. No States' Rights advocate ever denied the power of the Congress, although many restricted it and maintained that the States retained a concurrent right. It is undeniable that if the National legislature had fulfilled its duty and provided a bankruptcy system, and having established its legitimacy and application, would have preserved, and, from time to time, improved it, little difficulty could have arisen on this subject. It would have been as firmly established and as felicitously developed as the laws of naturalization. The case of *Chirac versus Chirac*⁵⁹ finally and definitely laid down the ruling that the power of naturalization is sufficiently vested in the Congress by the terms of the grant, because by the nature of the power it must necessarily be given such construction. Furthermore, the *Constitution* ordains: "The Citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States."⁶⁰ Even in the presence of great political strife, the case of *Dred Scott versus Sandford* confirmed this judgment, and so unqualifiedly established the axiom that it was accepted, and as a general rule was never afterward the subject of legal argument.⁶¹ Had the bankruptcy section of the same clause received as complete and timely attention, there is little doubt but that its history would have been less turbulent. The parts of the fundamental law which relate to bankruptcies are stated as definitely and explicitly as those which apply to the subject of naturalization.⁶²

⁵⁹ 2 Wheat. 259.

⁶⁰ Art. IV, sec. 2, cl. i.

⁶¹ 19 Howard, 393. (1857).

⁶² The judgment rendered in *Sturges vs. Crowninshield*, was distinctly confirmed in *Farmers' & Mechanics' Bank vs. Smith*, 6 Wheat. 131; *Smith vs. Mead*, 3 Conn. R. 253; *Boardman vs. De Forrest*, 5 Conn. 1; *Roosevelt vs. Cebra*, 17 Johns. 108, and *Kimberly vs. Ely*, 6 Pick. 451.

Ogden vs. Saunders was argued with unusual completeness by eminent counsel and given months of study by the court. It was re-affirmed in *Blanchard vs. Russell*, 13 Mass. R. 1; *Hemstead vs. Read*, 6 Conn. R. 480; *Betts vs. Bagley*, 12 Pick. R. 572.

On justification of loose construction, cf. *McCulloch vs. Maryland*, 4 Wheat. 316; Story, "Commentaries," II, 47 et seq., and Thorpe, "Short Constitutional History of United States," 316.

The power of the Congress is limited only by the requirement of uniformity, for it can not exceed that limitation in legislating under the grant of the *Constitution*. The derivation and qualities of the power, as well as how far, if at all, the States may exercise it, have been sufficiently discussed. The best judgment during a period of more than a century and a quarter is that it is not an inferred or a constructive power, but one of the express grants of the *Constitution*, a plenary power, capable of development to meet the vicissitudes and needs of the people.

The peculiar words used in the grant must be noticed in treating the extent of the power of the Congress. The language is that the power is delegated not to pass "uniform bankruptcy laws"; not "a law on bankruptcies"; not a specified "system of bankruptcy laws," notably the English system, but "uniform Laws on the subject of Bankruptcies....." Note well that the power is granted in no vague or compromising terms, to pass any conceivable law relating to the subject, with the sole proviso that, it be uniform in its application. There is another universal canon, applicable to every act of legislation, that it be not contrary to the public good. It is not an extreme view which has been expressed in the course of debates, that the Congress may pass a valueless law on the subject, or "if, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on the subject must cease, . . . the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide."⁶³

With the first attempt to pass laws by virtue of this power it was made a question whether the Congress could extend the benefits of such a law to others than merchants as comprehended by the English statutes, to the provisions of which the lawgivers were professed to be limited. Mr. Woodbury, of New Hampshire, said in the Senate that the legislative power of the Congress is limited to bankruptcies, and that the word in his apprehension was never intended to extend beyond embarrassments and failures among business men. He said further, that the laws in the thirteen States must be varied to meet the different

usages, pursuits, prejudices and educations; but the merchants throughout the confederacy must enter remote States, and it might be convenient and salutary to have similar rules and laws as to debts, failures and adjustment of their affairs."⁶⁴

It was necessary to define the meaning of the words "bankrupt" and "bankruptcy" within the meaning of the *Constitution*. The conclusion early arrived at was that a law on the subject of bankruptcies, in the sense of the *Constitution*, is a law making provision for persons failing to pay their debts. Whenever a man's means were insufficient to meet his engagements, it was considered that the condition of bankruptcy had arisen. The best and most distinguishing definition of bankruptcy is insolvency beyond the chance of recovery. It is sufficient to state here that since Marshall's decision in *Sturges versus Crowninshield*, it has been generally admitted that "Over the whole subject of bankruptcies, these failures, the power of Congress, as it stands on the face of the Constitution, is full and complete." The principal arguments which arose at this point centered on what, under the American statutes, should be considered a bankruptcy, and then what class of citizens should be embraced in the application of the laws formulated for bankrupts. Great opposition to the law of 1841 arose on the ground that it was an insolvency law, and as such, within the province of the States by the doctrine of residual sovereignty. This was refuted by the recognition that bankruptcy is but the legal cognizance of insolvency. On the other

64 "The system had been limited essentially to persons more or less engaged in trade..... The person coming within its operation had his bench ruptured or broken up. The bench of whom? Not of the farmer—not of the mechanic—but the money-dealer, and the bench or counter of the merchant. Grant that some persons not strictly traders, may at times have been included in the provisions of some laws on the subject of bankruptcies; yet this was where the power of legislation was unlimited—when all legislation, as to all creditors and others, was invested in one body. It has but seldom occurred anywhere, and existed nowhere at the time of the grant of power to Congress.

That laws on the subject of bankruptcies were then deemed commercial only is further manifest from the fact that when, late in the session of the Convention which framed the Constitution, this clause was introduced, it was coupled with a clause regulating the duties, etc., on foreign bills of exchange..... In a Constitution, therefore, created, in a great measure to benefit commerce, it was natural to confer power to make uniform laws on a commercial subject on Congress. Farmers and mechanics, by the scope of the framers, were never intended to come under the jurisdiction of the general government." Elliot, "Debates," IV, 493.

point, it was decided in the lower courts, and the decisions were affirmed by the United States Supreme Court and concurred in by the State courts in general, that the law of bankruptcies applies to all failing debtors, and the power of the Congress is not restrained to any particular mode of discharge, whether voluntary or involuntary, and furthermore, that the power exists to relieve the insolvent debtor, whatever his position in society, from debts, antecedent as well as subsequent to the passage of the law.⁶⁵ For reasons of policy there have always been restrictions in every draft of laws relating to those who are capable of coming under its provisions. For example, persons legally declared *non compos mentis*, fraudulent debtors and minors are always excluded, and this is the best evidence of the extent of the power of the Congress—that it can place limits. Also a minimum amount of indebtedness is always within the purview of the law. Justice Catron held the opinion that, "the power of Congress extends to all cases where the law causes to be distributed the property of the debtor; this is its least limit. Its greatest is the discharge of the debtor from his contracts."⁶⁶

In *Nelson versus Carland*⁶⁷ it was made a question whether the Congress was authorized by the *Constitution* to allow voluntary petitions in bankruptcy, and it was contended that this feature constituted nothing more than an insolvency law, and as such, was not warranted. It has since been repeatedly decided that this does not render the law an insolvency measure, and that the Congress is justified in passing an insolvency law which would operate merely to liberate the person of the debtor, if this were considered wise. The power of the Congress has been further extended by the deductions of the Supreme Court to authorize the passage of an act giving the United States preference over all other creditors in all cases.⁶⁸ The "Sweeping clause" of the

65 *Kunzler vs. Kohaus*, 5 Hill 317; *Sackett vs. Andross*, 5 Hill 327. The former case decided, *inter alia*, that the voluntary feature of the bankruptcy law of 1841, involving a principle hitherto unknown in the laws of any country, was unconstitutional, because not within the contemplation of the framers of the Constitution. Cf. *Dillon*, 250.

66 *In re Klein*, 1 Howard 277, *in notis*.

67 1 Howard 265; cf. Andrews, "American Law," ch. XVIII.

68 *United States vs. Fisher et al.*, 2 Cranch 358.

Constitution was the *ratio decidendi* in this case.⁶⁹ A further discussion of the technical meaning which has been given to these terms, "bankrupt" and "bankruptcy," will be found in another section.⁷⁰

We come now to a narration of the manner in which this express grant has been expanded during the years of its history. In reasoning out justification for the extension of the power, either by the Congress or by the Supreme Court, it is evident that the formation of the Government of the United States was not completed by the publication of the *Declaration of Independence*, the Revolution and the adoption of a National *Constitution*. These memorable events were productive of only outlines of a general design—the problem of forming specific rules for the administration of the new Government involved matters which had baffled the wisdom and patriotism of the fathers of the Nation. It was impossible for the framers of the *Constitution* to set forth specific and exact instructions for the guidance of the National Government in its dealings with the various known and unknown difficulties and dangers which the new Nation would be forced to meet and overcome in its progress towards freedom, strength and prosperity. It was impossible to name, define and fix expressly, with unquestioned certainty, the nature and limits of the different powers which it was necessary and proper for the people of the United States to delegate to the National Government, and to the several State governments, in order to provide the most free, adequate and self-sufficient form of government known in political history. James Madison remarked in one of the early sessions of the Congress that it was impossible to confine the government to the exercise of the express powers of the *Constitution*, unless the *Constitution* descended to recount every minutia.⁷¹ He recalled that there had been discussion on this point in the Virginia ratifying convention and that the result of such discussion had been favorable to loose construction. With this understanding the *Constitution*

69 "The Congress shall have Power..... To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, sec. 8, cl. 18.

70 Appendices A and B.

71 Speech, Aug. 18, 1789.

was ratified. Nearly every statesman of the early congresses expressed views on the manner of interpreting the *Constitution*. Daniel Webster called attention to the fact that it did not mention "traders" or did not exclude "non-traders," nor did it refer to a voluntary or involuntary quality. He was of the opinion that the power granted to the Congress was given in the fullest manner, and by the largest and most comprehensive terms and forms of expression, and that it was illogical to limit interpretation by vague presumptions of a reference to other codes, or conjectures about the intent of the framers, "nowhere expressed or intimated in the instrument itself, or any contemporaneous exposition."⁷² Its concise form is the best proof that it was intended for general extension.

Even if the framers of the *Constitution* did look to the English system of their day, it does not follow that they intended to fetter their country with an imitation of the contemporary English statutes. Although there is evidence that this system was in the minds of the delegates, and that the first American law was but a transcript of it, still it is also a matter of record that the commercial and financial organizations of other countries were known to the members of the Convention. And no one has ever been able to substantiate the theory in regard to any social institution or branch of law, that the offspring should remain rigid, inelastic and petrified, while the parent system was developed. It is unreasonable to impute to the Federal Convention and the State ratifying conventions the intent to deny all future modification and development. The early English system regarded financial failure as a crime and its application embraced all persons. It has changed many times before and since 1787, and no logical mind would argue that, even if we are bound to follow the English model, we could not notice and adopt modern improvements in it, but must confine ourselves to the one in use in 1787.

In such reasoning the ultimate criterion has not been used as a basis. To discover this one must look beyond the two systems and compare their causes—the powers which created each. These powers must be compared to comprehend the true analogy. The argument based on a comparison of the power of the Congress

of the United States with the creation of the Parliament of England was a fallacy. The true criterion is power, the power of the Congress and the corresponding power of the Parliament, and then, since the Parliament had, at the time of the Convention, original and unlimited power, it will be readily admitted by the most strict interpreters of the *Constitution* that its framers intended to confer such original, unlimited and exclusive power, in respect to this branch of legislation, on the law-making body of the new Nation. To be consistent the same rule of interpretation must restrict innovations of the laws on the subject of patents, copyrights, *etc.*, all of which are transcripts of the English statutes. To follow this principle in all similar cases would render the Government static as well as inefficient to provide for the new and complex problems and institutions of a progressing people, prevent adaptation of existing measures to changing circumstances and crystalize the government in the form and condition which existed when the *Constitution* was framed; but it is not justifiable to apply the rule in one case and not in all.

The delegates exercised exceeding care in working out a scheme by which, for the benefit of the finances and commerce of the republic, the Congress was confided with the exclusive power of fixing the value of and coining money, of standardizing it further by proscribing the issue of State bills of credit, and in every way standardizing the medium and methods by which contracts and debts are discharged. This aim would be defeated if, after all, the States should retain the right to declare that contracts may be discharged upon the payment of three fourths of the obligation, as in the case of Ogden *versus* Saunders under the New York law of 1801, or as in some of the States, without any payment at all. If it was intended by the delegates to allow the States to retain the power of setting up laws which would remit even present debts, the clause of the tenth section would not have been inserted as an impediment. No great or important political object would have been attained thereby, for future debts soon become present debts.

It is undoubtedly true that the opponents of the extension of the power of the Congress were zealous and sincere in their attitude. In reading their objections it is noticed that they are due to lack of knowledge of the aims, functions and duties of govern-

ment, or the needs of the citizens. When the true function of a republican form of government had been realized, and after many years of suffering and misery among the debtor class of America, this objection was finally transformed into a cordial and concerted effort by all law-makers to promulgate wise and beneficent laws, and the system of bankruptcy relief grew more rapidly in America than in any other country.

In reply to the assertion that clause four of section eight of the first article of the *Constitution* was for the purpose of preventing the emission of paper money, it is necessary only to refer to another clause, "No State shall emit Bills of Credit."⁷³ This was later contested and decided in *Craig versus State of Missouri*.⁷⁴ The contention that the practice of making creditors accept depreciated and worthless property was intended to be destroyed by the grant, is also refuted by the declaration, "No State shall make any Thing but gold and silver Coin a Tender in Payment of Debts."⁷⁵ If the destruction of the corrupt practice of instalments had been the intention, it would have been expressed in more direct language. The obvious purpose and desire was to prevent the impairment and nullifying of a contract by any method. The object sought in placing the restriction on the States was to maintain the inviolability of contracts in whatever form or direction it might be assailed. The intention was phrased in the most general terms to comprehend one and all forms of infractions of contracts either by retrospective or prospective actions, by methods then known or those to be contrived by a future generation of American business men; for the spirit of a constitution is perpetual.

The great magistrate, Marshall, relecting on the subject said:

"We cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of the whole people by their representatives in convention, in order to unite the thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was attached at that time to the tenth section of the first article. The power of

⁷³ Art. I, cl. 1, sec. 10.

⁷⁴ 4 Peter's, 410.

⁷⁵ Art. I, cl. 1, sec. 10.

changing the relative situation of the debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, has been used to such an extent by the State legislatures as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with the truly wise as well as the virtuous, of this great community, and was one of the great benefits to be expected from a reform of the government."⁷⁶

The decisions and practice of the Supreme Court of the United States in defining and putting into operation the decree of the *Constitution* in regard to a uniform system of legislation for the condition of bankruptcy have withstood the assaults of partisans of every interpretation. After the early years of strife the accord of the States has been universal and generous. That the Congress should have paramount and undivided power over the commerce and finances of the country, the most glaring weakness of the old confederation, was undoubtedly the intention of the people of the American Commonwealths and their representatives in 1787. The motives which prompted the people to clamor for this change of government and to confer on the Congress supreme authority over foreign and interstate commerce are as valid and convincing when applied to this phase of the general scheme for regulating the commerce and finances of the nation. Successful fruition of the desires of the people can be accomplished only by allowing the Congress exclusive freedom in the exercise of the power to regulate commerce and bankruptcies, by permitting that body and forbidding the States to coin money and to regulate its value, to emit bills of credit and to impair the obligation of contracts. Only by unlimited, unrestricted and undivided power in the execution of this trust by the Congress can the original idea of the framers of the *Constitution* be carried

⁷⁶ Cf. Dissent of Marshall in *Ogden vs. Saunders*, 12 Wheat. 213, Dillon, "Marshall's Decisions," 581.

into effect. This principle holds to-day, as well as prior to, during, and since the adjournment of the Constitutional Convention. The needs and desires of the people must be considered the first and universal rule of interpretation. A constitution is composed of static, fundamental principles; the general welfare and enlightened public opinion of every generation should be the living law.

CHAPTER VI.

“.... TO ESTABLISH UNIFORM LAWS ON THE SUBJECT OF BANKRUPTCIES THROUGHOUT THE UNITED STATES.”

Standing upon the reviewing ground of the twentieth century, whether we look to the north or to the south, to the east or to the west, we behold in the United States of America a universal system for the disposition of insuperable debts. The practice which as late as 1830, Webster lamented as “hydra-headed and the slave of four and twenty masters,” happily has been replaced by the National Bankruptcy Law; and the wide-spread benefit arising from the unification of the bankruptcy and banking laws has prompted a nation-wide effort to reform and codify all branches of legislation. The tendency of the present age is especially to assimilate and integrate all mercantile laws.

In order to realize the confusion arising from the multiplex and discrepant State laws for the release of the debtor and the distribution of his effects, prior to the enactment of the Federal law, it is necessary only to consider the inconvenience and injustice which result from lack of uniformity in our day in the various State laws on divorce, shipping, and insurance. American citizens to-day would not tolerate such a condition as that of debtors before the promulgation of this salutary law. The misery, the wretchedness, the suffering, the despair, the crime and the injustice of those years are now scarcely comprehensible. And it was all due to the timidity, ignorance and conservatism of the early law-makers of the Republic. Although they seemed to have fully realized that trade and commerce transcend the limits of any State, indeed those of the country and become international,¹ they did not legislate according to their convictions. They were not cognizant of the cause of so much distress among the Nation's citizens. They were not aware that they

¹ This is proved by art. I, sec. 8, cl. 3: “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

possessed plenipotentary authority to prepare and apply remedies for this ill of society, and to alter and improve them when necessary. Also they had too great respect for tradition to part company with it and to fall in with the spirit of progress. Of no branch of legislation was this more true than that in regard to the alleviation of the condition of debtors.

Some of the accounts of these early days read like tragedies. To the misfortunes of the debtor class, due to lack of comity and harmony among the laws of the several States, indeed to the conflict and repugnance of the State laws, were added the hardships arising from their instability and viciousness.² For many years, according to Webster, the usage was, "Having the power to establish uniformity, we delegate by sufferance the authority to create variety."³ This condition and its results can best be explained by a description of the operation of the various State laws. Belknap, in his *History of New Hampshire*, describes the working of the law of that State.⁴ A tender law was enacted in 1785, and had it been vigorously executed, it is probable that two thirds of the community would have been in prison for debt. Its purpose was to release the debtor from prison upon the tender of his real or personal property in lieu of money. In its intent it favored the creditors, for if the goods tendered were not acceptable, they could refuse them, take out an *alias* within a year, and levy on any property of the debtor which could be found. But the law was abused by evasion. When an execution was foreseen, the debtor, a farmer for instance, would drive his cattle into a neighbor's pasture, conceal his personal goods and make

² Senator Robert Y. Hayne said in respect to them: "It was felt a grievance by the Roman people, that the tyrant should write his laws in a small character, and hang them up on high pillars so that it was difficult to read them; but that grievance would have been rendered still more intolerable, if the inscriptions had been varied with the rising and setting of the sun. Not a year, hardly a month passes by, which does not witness numerous, and, in many instances, radical changes in the insolvent systems of the several States. It is found utterly impracticable to conform to them or to guard against them. It defies the wisdom of the bench, or the learning of the bar, to give certainty or consistency to a system of laws, upon which twenty-four different legislatures are constantly acting, and almost constantly innovating—a system which changes with a rapidity that deceives the mental vision, and leaves us in the grossest ignorance." Speech, in Senate, May 1, 1826.

³ "Works," V, 14.

⁴ Volume II.

over his real estate to a relative. The result was that creditors, finding its effect disadvantageous, ceased to press the enforcement of the law, and debtors were slower to pay than under the common law practice. The expenses of its process were enormous to all litigants. There were attorneys' fees, entrance fees, taxes and release fees. Tax-payers who had no claims to collect, complained of the public burden. The attorneys grew rich, and their number and activities kept pace; the number of claims in the courts multiplied ten-fold; the judges were overworked; the hands of the sheriffs were full of writs, and the citizens of the commonwealth so exasperated that they resorted to the calling of an unconstitutional and illegal convention to remedy the disastrous condition.

By Penn's code in colonial times, tools *etc.*, were exempted, and later Pennsylvania enacted a law similar to that of New Hampshire.⁵ But during times of panics and bank failures, the Keystone State imposed the condition that banks could not obtain executions until they resumed specie payments. Virginia had the same rule, which originally had been enacted in 1837.⁶ In Ohio, upon demand by the debtor, the sheriff or constable about to sell property taken in execution for debt was required to summon three house-holders of the county to determine the money value of each article. Unless at public auction the article brought two thirds of the assessed value it was not permitted to be sold, and this law was enforced by public demonstrations. Indiana required the same appraisement, but the property could be disposed of at one-half of the assessed value. Farming implements, kitchen utensils and house-hold goods were not salable for less than the prescribed one-half.⁷ This act failed to prevent the sacrifice of property. Well-cured hay was knocked down for one dollar a ton, and a Dayton newspaper reported that five hundred acres of wheat were sold for six dollars.⁸ A tax-collector of southern Illinois reported that men in his district were eager to work out their taxes at the rate of twelve and one-half cents per day.⁹ As the slaughter continued, the words "fair value"

5 Doyle, "Middle Colonies," 396.

6 "Laws of Virginia," 1842, ch. 95.

7 Laws of 1841, chs. 42, 49 & 62.

8 McMaster, VII, 44.

9 Ibid. 45.

were generally substituted for a specified percentage of the true value, and this arbitrary standard gave rise to greater complications. Illinois also required that the appraised value be written on the execution.¹⁰ Michigan had the same laws, but added a condition that the real estate could not be attached unless the personal property was insufficient to satisfy the claims. The creditor was allowed ten days in which to accept the property thus available, at the expiration of which time the sheriff was authorized to endorse a discharge on the levy, and the creditor was forced to pay the costs.¹¹ By the laws of Mississippi, if the property did not obtain a bid of two thirds of its appraised value, the writ was stayed a year.¹² As time wore on the number of articles exempted increased. In addition to tools and implements of trade, the law of New York added one hundred and fifty dollars worth of house-hold furniture and any team of a house-holder or person supporting a family.¹³ Georgia exempted twenty acres of land for the head of the family and five acres in addition for every child under fifteen years of age, a horse or mule, ten hogs, thirty dollars worth of provisions and dwellings and improvements to the amount of two hundred dollars.¹⁴ Kentucky added to this list a saddle, bridle, bedstead, and necessary bedding, six chairs, all turkeys, chickens and ducks raised on the place, one cow and calf, five sheep and six months' fuel.¹⁵ Tennessee, revising an act of 1820, exempted one more bed than the adjoining State, "containing not more than twenty-five pounds of feathers, and one other cow and calf."¹⁶ Michigan forbade taking from a lumberman all his oxen, the fisherman all his skiffs and nets, the farmer all his ploughs, wagons, cattle and implements, the mechanic all his tools, the printer all his type, and the housewife could retain her spinning-wheel, cows and furniture to the value of two hundred and fifty dollars. In Michigan all wearing apparel and books to the value of two hundred and fifty dollars were exempt from attachment.¹⁷ Missis-

10 Laws, Feb. 27, 1841.

11 Laws, 1842, No. 88.

12 Laws, Valuation and Stay Laws, c. 5, 1840.

13 Laws, 1842, c. 157.

14 Act of Dec. 11, 1841.

15 Laws, March 3, 1842, c. 421.

16 Laws, 1842, c. 46.

17 Laws, 1842, No. 48.

issippi was most indulgent in the treatment of debtors, permitting them to retain one hundred and sixty acres of land and one house, a long list of utensils and implements, cows, hogs and five hundred pounds of pork and bacon. Missouri safeguarded animal culture by exempting ten head of "choice" hogs and the same number of "choice" sheep, one cow and calf and beasts to the value of sixty-five dollars.¹⁸

What was lawful in one State frequently was unlawful in another. The debtor was often amenable to one law and the creditor restricted by the different code of another State, and the above mentioned inconsistencies and incongruities of the State systems were the ground of innumerable law suits and conflicts between the citizens of the Commonwealths, and indeed between the Commonwealths themselves. Following an old adage, "The law favors the diligent creditor," the whole property of a failing debtor was nearly always absorbed by the inhabitants of the same State or district as the debtor, and, as a consequence, in order to obtain some satisfaction, the debtor was harrassed by new suits and endless litigation every time he ventured beyond the boundaries of his own State. There were numerous cases of unfortunate debtors having been lured from their communities and families into the legal net of another State where they were held prisoner for many years. Some States permitted attachment of the property of others found on the premises at the time of execution, while other Commonwealths permitted reclamation.

The diversities and consequent mischief of these State exemption laws will be best understood by quoting excerpts from them. The Delaware constitution of September 10, 1776, reads:

"The common law of England, as well as so much of the statute law as has heretofore been adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this Constitution, and the declaration of rights, etc., agreed to by this Convention."

¹⁸ Act of Feb. 25, 1843; McMaster, "History of the People of United States," VII, 44 et seq. While these citations are made from the enactments of a later period, the same laws in a more crude state prevailed in the earlier time. This is evidenced by reference to them in discussing the later laws and by reference to them in the laws themselves.

The Virginia constitution of 1870, a compilation of prior laws, covers this subject as follows:

"Ever householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnisheeing, or sale, under any execution, order or other process, issued on any demand for any debt heretofore or hereafter contracted, his real and personal property, or either, including money and debts due him, whether heretofore or hereafter acquired or contracted, to the value of not exceeding two thousand dollars, to be selected by him; *Provided*, that such exemption shall not extend to any execution, order or other process issued for the purchase price of said property, or issued on demand of labor or mechanic, fiduciary obligation, or attorney's fee for money collected, taxes, levies, rent past accruing, legal or taxable fees of any public officers of a court hereafter accruing."

An amendment in 1902 altered this section so as to read:

"If the property purchased, and not paid for, be exchanged for, or converted into other property by the debtor, such last-named property shall not be exempted from the payment of such unpaid purchase money under the provisions of this act."

The earlier practice of Virginia had been complained of as incompatible with that of the other States.¹⁹

Section thirty-eight of the constitution of Maryland contains the sole reference in that document to the subject of debt. "No person shall be imprisoned for debt." This is defined by State *versus* Mace and Trail *versus* Snouffer.²⁰

New Jersey's constitution of 1844 is like that of Maryland, but it adds, "..... in any action or on any judgment founded upon contract, unless in case of fraud." The exemption clauses of some of the States more recently admitted into the Union are

19 "The merchant of Pennsylvania, trusting the merchant of Virginia, knew that his own whole estate, real and personal, was liable for the payment of his debts; whereas by the insolvent laws of the State [Virginia] the former might give an extensive credit; the latter might invest it in land which was intangible for the payment of his demand." In 1902, section 191 added a remedy. "The said exemption shall not be claimed or held in a shifting stock of merchandise, or in any property, the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration." "Annals of Congress," 1802-1803, p. 378.

20 5 Md. 337 and 6 Md. 308.

unusually generous with the goods of others. Michigan's constitution of 1850 provides:

"The personal property of every resident of this State, to consist of such property only as shall be designated by law, shall be exempted to the amount of not less than five hundred dollars from sale on execution, or other final process of any court, issued for the collection of any debt collected after the adoption of this constitution."²¹

A subsequent section provides:

"Every homestead of not exceeding forty acres of land, and the dwelling house thereon and the appurtenances to be selected by the owner thereof, and not included in any town-plat, city or village; or instead thereof at the option of the owner, any lot in any city or village, or recorded town-plat, or such parts of lots as shall be equal thereto, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of the State, not exceeding in value fifteen hundred dollars, shall be exempt from forced sale on execution, or any other final process from a court. Such exemption shall not extend to any mortgage thereon lawfully obtained; but such mortgage or other alienation of such land by the owners thereof, if a married man, shall not be valid without the signature of his wife to the same."²²

Section three exempts the homestead from sale for the debts of the deceased, and by the following section, the property of a widow, without children is exempted. Property *femme sole* remains so and is exempted from sale to meet the obligations of the husband.

By the laws of some of the States, debtors could be arrested either on mesne or final process; in others they were permitted to "swear out" after a notice of a few days. To add to this turmoil, some the States distinguished fraudulent from unfortunate debtors, and some permitted preferential assignments in accordance with common law methods. A few allowed long stays of execution and exempted Revolutionary War veterans, and sometimes their wives and widows, from prosecution for debts. By some codes a definite number of creditors' assents was requi-

²¹ Art. XVI, sec. 1.

²² Ibid. sec. 2.

site for a discharge, while a neighboring State authorized it without consulting the desires of any of the creditors. Further complications arose from the decisions of the Federal courts, ruling that, a State had no extra-territorial jurisdiction and therefore could not give legal notice to non-residents. Each State was inclined to favor, give preference and precedence to its own residents, either in the alleviation of the burden of the debtor or permitting advantages to the creditor. Mr. Hastings, of Massachusetts, urging the repeal of the law of 1800, ridiculed a constitutional uniformity which established competing systems of fraud. Some States endeavored to assert sovereignty and to discharge from unfulfilled contracts. The reasons for allowing claims varied in every section—some States had temporary, others permanent systems; some bankruptcy measures and others only insolvency laws. Several failed to act on the subject at all. One or two disregarded *pro rata* distribution and based the settlement of claims on the number of the creditors. The effect of the laws of those States which held future earnings liable was to banish debtors to States which did not do so. A debtor would be idle under the laws of the former, and active under those of the latter; but in most cases he went where he could rise again.

By the National Bankruptcy Act these various exemptions are legally reconciled.²³ A noted decision on the matter is that by Justice Miller:

"The provision of section 14 of the bankruptcy act, adopting the exemptions in favor of execution debtors established by the law of the several States, does not destroy the uniformity of the

23 In re Beckerford, 4 N. B. R. 203. Pomeroy, on "Constitutional Law," p. 410, expresses an opinion at variance with the current of judicial decisions, saying that, a State exemption law enacted subsequent to the date of the contract is unconstitutional. Cf., also, Cooley, "Principles of Constitutional Law," 343.

The policy of exempting land from liability for the payment of debts is a remnant of feudalism. It has no legal place in the American form of government, but is there only as an extra-legal doctrine prompted by economic and charitable motives. It originated in countries where the possession of power, always based on property, was hereditary, necessitating the locking up of property to preserve power. Due to the abuse of this privilege, in some countries, England, for example, the entailed lands have been made liable for debts. Cf. "Annals of Congress," 1803, 549.

bankruptcy act nor violate any provision of the Federal Constitution."

It is unnecessary to add more instances to prove that the lack of a uniform system of bankruptcy laws was responsible for a lamentable condition. Its results can be easily imagined. It is estimated that about 1833 seventy-five thousand persons were sent to jail each year for debts.²⁴ From documents used in the Senate of New York in 1817, it appears that the keeper of the "Debtors' Jail" in New York City reported that during the preceding year nineteen hundred and eighty-four debtors were confined, and that more than six hundred were always in the prison or on its limits. In this report the sheriff of the county certified that seven hundred and twenty-nine were imprisoned for debts of less than twenty-five dollars.²⁵ In 1833 in New York there were ten thousand people imprisoned for debt, seven thousand in Pennsylvania and three thousand in each of the States, Massachusetts and Maryland. The jails of Boston during 1828 held one thousand and eighty-five unfortunates; the creditors of Philadelphia confined during only eight months of 1829 eight hundred and seventeen, of whom eighty owed less than one dollar. Baltimore, during the same year, had nine hundred and forty-four, and to complete the study of thirty-two prisons for the year 1820, there were two thousand eight hundred and thirty-one in jail for less than twenty dollars.²⁶ At Carlisle, Pennsylvania, the sheriff at one time advertised twenty-seven tracts of land for sale,²⁷ and a petition from Northumberland County in that State recited that "debts were unpaid, creditors dissatisfied, and the jails full of honest but unfortunate persons whose wives and children had thereby become a burden on the township." The people of Wayne County daily saw their property passing into the hands of rich speculators, while the citizens of Pike County asserted that their property was constantly being sold at one fourth of its value. Sundry citizens of Huntingdon County presented a memorial to the Congress stating that, their property taken for debts was selling for less than sufficient to pay the

24 McMaster, VI, 99.

25 Ibid. IV, 534.

26 McMaster, IV, 99.

27 Ibid. IV, 487.

fees of the officials.²⁸ These accounts show that during the early years of the National era there was no improvement on the condition under the Confederation, which had no requisitory power, no independent judiciary, but could only recommend legislative and judicial measures. On account of the failure to apply the virtues of the new *Constitution*, the commerce of the whole country was prostrated and almost ruined. Private debt was almost universal, bankruptcy and financial distress were the rule rather than the exception, and the maze of difficulties was so intricate that few were hopeful of ever enjoying the promised freedom, happiness and success of the *Constitution*.

An eminent English jurist said that, it was better for a community that a rule should be certain than that it should be just, for the obvious reason that the citizens could conform their conduct and frame their contracts in such a way as to avoid its injurious effect. By this same philosophy the *Constitution* requires that if any laws on the subject of bankruptcies are established they must be uniform. The State laws were not uniform, and in the same degree were inadequate and subject to great limitations. The incoherent and irreconcilable State laws treating debt prior to the Federal law tended to the opposite—non-uniformity.²⁹ A method was required which would render the discharge of a citizen of any State binding in all others; which would establish the same acts and defaults of the debtor as occasions for bankruptcy proceedings in every section; which would abolish the iniquitous privilege of preferences and which would enable the merchant of New York selling to the trader of Boston or New Orleans to feel confident that if unforeseen calamity should occur the debtor would not be able to place his assets beyond reach. The fact that this system removed jurisdiction from the States constituted its greatest merit, for so much of the business of every man is with the citizens of other States and even with foreigners that the limited extent of the validity of State laws was of little benefit.

There was a feeble attempt at uniformity among the States

²⁸ Ibid. 494.

²⁹ "The existing diversities and contradictions of State laws on the subject [bankruptcies] admirably illustrate the objects of this part of the Constitution, as stated by Mr. Madison; and they formed that precise case for which the clause was inserted." Webster, "Works," V, 21.

prior to the establishment of the National system, but it was based on reciprocal benefits and productive of slight good. The earliest record of such a movement was on March 9, 1687, under the administration of A. Brockholtz, substitute for Governor Andros. The court of New Castle requested the court of Upland to arrest one Smith, residing in the precincts of the latter, for absconding, after the promise to pay one hundred and thirty guilders and costs if execution were suspended. The court made itself security for him and reciprocity was promised by the court of New Castle.³⁰ Such acts were not considered unconstitutional in the absence of a Federal law, although it was distinctly enunciated by Taney, C. J., that such operations must be considered exclusively a matter of comity.³¹

There was no more potent and adequate remedy for the evils arising from State control of the subject of debt than to introduce and perpetuate a uniform Federal system. By the enactment of a Federal law to cover the subject, all of these conflicting State measures were, for the most part, suspended.³²

The establishment of uniformity does not remove from a State certain details of administration, although if the National judiciary desires to exercise it, it has plenary powers to regulate even the details of administration, provided the rules are uniform.³³ Local laws in the matter of exemption, dower, artificial persons and priority of payments are considered details of administration, and to embrace them in the Federal law would render it too cumbersome. A bankruptcy law may grant exemptions or may recognize the exemption laws of a State, and the fact that these laws differ in extent of liberality in the various States is not considered to impair the quality of uniformity.³⁴ It is supposed that the bankrupt's debts were contracted with the implication that he is entitled to the exemptions provided by his

30 Hazard, "Annals of Pennsylvania," 451.

31 5 Howard 309. Judge Johnson, in *Ogden vs. Saunders*, and Justice Story in *Boyle vs. Zacharie and Turner*, were cited.

32 Marshall expressed the opinion that, "This establishment of uniformity is perhaps incompatible with State legislation on that part of the subject to which the acts of Congress may extend." *Sturges vs. Crowninshield*.

33 *Six Penny Savings Bank vs. Stuyvesant Bank*, 10 N. B. R. 399; in *re Deckert*, 10 N. B. R. I.

34 In *re Beckerford*, 4 N. B. R. 203; in *re Deckert*, 2 Hughes 183; *Hanover Bank vs. Moyses*, 186 U. S. 181; in *re Rahrer*, 140 U. S. 545.

State, and creditors can not maintain a contrary action. In answer to this objection, as well as to the question whether if corporations would be permitted to come under the provisions, the uniformity of the law would be nullified,³⁵ the legal doctrine has held, "The Constitution contemplated uniformity in administration only,"³⁶ and not in regard to persons or geographical limits. The application of the law was to be of uniform advantage to debtors and creditors in the distribution of the estate of the bankrupt. There is no distinction made between natural and artificial persons, or even the different classes of artificial persons, as far as the possible operation of the bankruptcy clause of the *Constitution* is concerned. This does not oppose the passing of special laws for the regulation of the affairs of corporations. Webster objected to the application of a special provision of the law of 1841 to banks in order to remedy the evil of circulating depreciated paper money. He claimed that to do so would destroy the uniformity of the law, and was not within the constitutional power of the Congress.³⁷

The uniformity which the *Constitution* requires extends to every application of the law throughout all the States.³⁸ So far as it goes it must be uniform in every case, have one shape, one form, one fashion, one method of procedure, one rate of distribution of the insolvent fund, one mode of discharge and one sanction in every State. To accomplish this section ten of the law of 1898 goes to the extent of providing for the extradition of a bankrupt from one court to another just as any other person who is indicted. If we look to the confusion and injustice arising from the lack of uniformity under the Confederation; if we consider the exaggeration of this condition during the attempt by the States to administer this function of government; if we look to the discussions of the Convention which placed the clause in the *Constitution*, and the expositions of the *Constitution* and the particular clause by the most competent authorities; if we look

35 *Leidigh Carriage Co. vs. Stengel*, 1 N. B. N. 387.

36 *Hanover Bank vs. Moyses*, supra; in *re Jordan*, 8 N. B. R. 180. Cf., also, *West Co. vs. Lea Bros.* 174 N. S. 590; in *re Safe Deposit Ins.* 7 N. B. R. 392; in *re Smith*, 2 Woods 458; in *re Affold's Estate*, 16 Am. Law Reg. 624.

37 "Works," IV, 320.

38 That the law be uniform in application is the only restriction on the power of the Congress. In *re Silverman*, 4 N. B. R. 173; in *re Duerson*, 13 N. B. R. 183.

to the sources from which the provision was derived; if we dissect, analyze and construe the phrase; if we look anywhere and everywhere except to petty State jealousies and special interests, we can see but one and the same necessary purpose and meaning, and they can not be more clearly, adequately and unmistakably expressed than by the words of the clause itself; that, the laws on the subject of bankruptcies shall be promulgated by the Congress of the United States and shall be uniform throughout the Federal territory.

CHAPTER VII.

THE LAW OF 1800.

The present Federal law on bankruptcies, enacted in 1898, and amended in 1903, 1906 and 1910, and most recently in 1912 and 1917, embraces the experience of three former enactments, one in 1800, another after an interval of forty-one years and the third in response to the most urgent necessity after the Civil War, in 1867. The first law was a faithful transcript of the English statutes, due largely to the erroneous belief that the Congress was restricted to conformity with the only well-defined system with which it was familiar.' Before the passage of the first act and in the absence of a Federal statute, each of the States provided itself with an insolvency law or a nominal bankruptcy law, which *in reale* amounted to nothing more than an insolvency law, and unsuccessfully tried to control the situation. Each successive National law was an unquestionable improvement on its predecessor, and to-day the commercial interests of the United States enjoy an advantageous system almost adequate to the most exacting and unusual needs.

The minute books of the early congresses show that discussion and controversy in regard to bankruptcy legislation dragged on for twelve years before a plan was agreed upon. The first attempt to establish a system of bankruptcy laws by virtue of the constitutional grant was in the House of Representatives, June 1, 1789, more than two months after the first Congress met under the *Constitution*.² On motion it was ordered that Mr. Smith, of South Carolina, Mr. Lawrence, of New York, and Mr. Ames, of Massachusetts, "Be a committee to report a bill or bills to establish a uniform system on the subject of bankruptcies throughout the United States." There is no reference to this report, and no subsequent action was taken on it due to the *de novo* rule of pro-

¹ Enacted March 4, 1800, 2 Stat. L. 19; repealed December 19, 1803, 2 Stat. L. 248.

² "Annals of Congress," 1789-91, I, 418.

cedure which was followed in the early sessions of the Congress.³ There were numerous efforts to obtain consideration of the financial condition of the country by the Congress, but the excuse was always advanced that there were more urgent and important political matters. February 1, 1790, Thomas Hartly, of Pennsylvania, instructed by the Assembly of his Commonwealth to inquire whether the Federal government intended to act on the subject or to leave it to the States, moved that a committee be appointed to bring in a bill providing for a general system of bankruptcies in the United States. Mr. Smith, of South Carolina, objected to the matter being taken up immediately, explaining, "that the present situation of the country, . . . was such as to render a general law on the subject more intricate and perplexing business than the gentleman was aware of." He thought it prudent to defer action on the matter until the public debt was funded and the banks established, without which it was difficult to conceive how arrangements could be made to facilitate the payment of debts or the operation of such a law. Mr. Hartly consented to lay the motion on the table, and explained that he did not wish to hurry it through the present session, but merely desired that some steps should be taken showing that the Congress had the welfare of the credit of the Country in view. He thought that the *Constitution* required that the Congress pass a law on the subject. Mr. Sedgwick, of Massachusetts, remarked that, England, the country from which many of our precedents were derived, since the adoption of a system of bankruptcy laws, had enjoyed a degree of tranquility and domestic happiness unknown for a century before.⁴

On the twenty-second of March of the same year, a petition was read in the Senate from Nathaniel Tracey, praying that a law be passed for the relief of unfortunate merchants from embarrassments arising solely from inevitable mercantile misfortunes. The petition was ordered to lie on the table.⁵ July 5, 1790, a motion was made in the House for a bankruptcy law which would operate for the relief of sundry persons confined for

3 Joseph Gales, "Annals of Congress," I, 417.

4 "Annals of Congress," I, 1105-06. Our distilled spirits and revenue laws, among others, were adopted from England.

5 *Ibid.* I, 956.

debt in the jails of the County and City of New York.⁶ This motion, together with a petition from a number of persons of the State of South Carolina praying that the Congress would consider the expediency of passing a general law, was destined to lie on the table. A resolution was passed in the House, November 9, 1791, that a committee be appointed to prepare and bring in a bill or bills for the establishment of a uniform system of laws on the subject of bankruptcies, and that Messrs. Vining, Boudinot, Lawrence, Giles and Gerry be the said committee.⁷ More than a year later, Mr. William Smith, of a subsequent committee, presented a bill which was received, read twice before the House and recommitted. In the third Congress, December, 1793, a committee was appointed and reported in January of the next year. Its report received no more consideration than the work of the former committees.⁸ Again in the session of 1795-96, after considerably more preparation, a bill was received and made the order of the day for the committee of the whole house on June 25, 1796, but there is no record of its being given consideration at that time.⁹

The next session the question came to an issue in both houses. It had been agitated in every session of the Congress until then, and at that time, many contended that the country was in urgent need of some universal method of disposing of private debts throughout the land.¹⁰ Mr. Sitgreaves recognized the importance of the matter, and pleaded strongly for its consideration by the Congress. He stated that, several of the States were awaiting a Federal statute on the subject in accordance with which they could frame their laws. He cited Pennsylvania as one of the States then hesitating. On account of the short interval of

6 Ibid. II, 1659.

7 "Journal of House of Representatives," (1791) 166.

8 P. 149.

9 "Annals," 4th Congress, 1st sess. Dec. 16, 1795.

10 The attention of the Congress to the financial distress at this time was due to a message of President Adams who, moved by Robert Morris' sad experience, pointed out the defects of the law of May 28, 1796, "For the relief of persons imprisoned for debt, and to relieve the distress of the mercantile community." Richardson, "Messages and State Papers," I, 261; Schouler, "History of the American People," I, 381; Wiley & Rines, "The United States," IV, 343.

time remaining and the expense of printing the bills, the item was postponed.¹¹

In the House on November 27, 1797, Mr. Harper moved for the appointment of another committee. He insisted upon the expediency and usefulness of such a law, but predicted the difficulty of passing it. There was a request to appoint a committee to report the expediency of the Federal Government's acting on the subject at that time. Mr. Baldwin agreed to this proposal, and said that this committee could review the solemn discussions on this subject and calculate whether it would be worth while to go over the same ground, which had been trodden with so little success and with so many difficulties and discouragements. He said that our country is so extensive and the interests so varied that no system of bankruptcies could be formed to suit all parties. He expected the committee to revise former bills, suggest new provisions, and, if the situation throughout the land had altered, an entirely new bill might be proposed. Upon request, after a month's deliberation, the committee was increased to eleven members. This request was prompted by the general concern of the subject and the diverse interests of the various sections in contrast to the welfare of the National commercial interests.¹²

January 1st, of the next year, after an attempt to report the expediency of a bill, but not the instructions of his committee, the chairman, Mr. Harper, was restrained from continuing his report. On the third day of the same month he made a report for the majority of the committee as follows:

"In so many complicated, and as respects this country, so new a subject, as a system of bankruptcy, it must be expected that many difficulties will arise, that many doubts will be entertained, as to the possibility, and even as to the advantage, of such an establishment. Such doubts and difficulties have presented themselves forcibly to the committee, even in this preliminary stage of this business; but, without undertaking to decide how far it may be practicable to surmount them, they conceive that the attempt ought to be made. They are of the opinion that this institution is greatly desired by the mercantile part of the com-

¹¹ "Annals," 1796-97, 2nd sess. 1739-40.

¹² "Annals" 5th Congress, I, 643, and *Ibid.* 1797-99, 692.

munity, on which it is calculated more peculiarly to operate; and they can see no reason to doubt its beneficial effects in the support of mercantile credit, the prevention of fraud, the restraint of imprudent and destructive speculation, and the relief of honest industry, reduced to distress by the vicissitudes of trade, provided it can be adopted under such circumstances as may obviate the objections, and prevent the abuses, whereto it is supposed to be liable."¹³

After this report, a committee of five members was delegated to draw up a bill, and on the third of February, Mr. Bayard reported a bill, but the session closed without the report being considered on the floor.

In pursuance of the motion by Mr. Harper, a committee was appointed in the following session, and by its chairman submitted a copy of the draft prepared in the preceding session. Consideration was delayed until printed copies were provided, when it was made the order of the day in the committee of the whole for December 20, 1798.¹⁴ The bill, comprising forty-nine sections, was then read and discussed. Mr. Nicholas expressed the consensus of opinion that it was expedient seriously to consider the bill, and said, "From its complexity it could not be supposed to be understood so soon as taken up, and before voting they should consult a greater number of authorities, perhaps more than on any other subject that could come before the house." "To understand it," Mr. Harper replied, "it required only reference to two acts of Great Britain, which are the foundation of the bankruptcy system of that nation as it now stands." Considerable desire for postponement to consider and study the provisions of the proposed bill resulted in a negative vote, and the bill was read until the tenth section: "In case a bankrupt sold any of his property, the assignees are empowered to demand back such property, on payment of the purchase money." This was made necessary to avoid frauds, also the aim of the British laws. The inconvenience to a few *bona fide* cases was considered necessary to be endured for the greater good. A period of six months was designated within which a transfer of this

¹³ Ibid. 786-88, 196.

¹⁴ "Annals," III, 2465.

kind could be considered a collusion. This proposal, as well as the stipulation that such repurchase could be made at a "fair price," was an innovation on the English statutes. Mr. Goodrich pointed out that, the difficulties were so great and the subject so delicate and important, it would be advisable to postpone a decision of this paragraph in order to have time to reflect on it. On the 26th of December, Mr. Otis reported an amendment to the tenth section, which, in substance, permitted the creditors to buy back any desired property, and substituted another clause to the effect that a *bona fide* purchaser could file a bill in equity against the assignee and if the court sustained the claim, the purchaser could recover the purchase price and the entire amount expended for improvements or for any accretions.¹⁵

This discussion carried over to the next session. In February, 1800, the Senate was informed by a message from the House that a bill to establish a system of bankruptcy laws had passed the latter body, and that the concurrence of the Senate was desired. The bill was received, read and ordered for the second reading, after which it was committed. The subject was intermittently considered by the Senate, for the most part in committee, but nothing decisive was done before adjournment.¹⁶

March 17, 1800, the Senate resumed the reading of the bill sent from the House, which had been considered on the 13th and postponed. A motion which provided that, "This act shall not be construed to extend to farmers, grazers, drovers, tavernkeepers, or manufacturers," was lost, and after attempting several minor amendments, it was ordered that further consideration of the bill be postponed. It was taken up on the twentieth, when a motion was introduced: "*Provided, always.* That in case of a *bona fide* purchase, made before the issuing of the commission from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information, or notice, of any act of bankruptcy committed, such purchase shall not be invalidated, or impeached." This passed in the negative. On the 28th, the bill was read for the third time, and, on the question of agreement to its final passage, it was carried in the affirmative, yeas, 16; noes, 12.¹⁷

¹⁵ Ibid. 2426, 2441, 2465, 2489, 2656, 2667, 2577, 2582, 2649.

¹⁶ For debates, cf. "Annals," 1799-1801, 50, 68, 110, 126, 388, 508, 534.

¹⁷ "Annals," sixth Cong. 110, 111, 115, 126.

In the House of Representatives, Mr. Bayard was the champion of the bill, and with great perseverance again reported it on the sixth of January, 1800. It was considered, amended and further action postponed by a committee of the whole on the twenty-first. One month later the bill was taken up for final reading. Mr. Jones moved this additional section: "*And be it enacted*, That nothing in this act contained, shall extend to, or in any wise affect or operate upon debts contracted, or transactions which may have taken place, prior to the passing thereof." This amendment was lost.¹⁸ Without any further debate, upon the final reading of the measure, a vote was taken which resulted in a non-decision. Forty-eight opposed, and forty-eight favored the bill. Mr. Sedgwick, of Massachusetts, the Speaker of the House, cast the deciding vote in favor of the law.¹⁹ A few weeks later, as noted above, it was passed in the Senate, and was promptly signed by President Adams.

This subject seems to have been legislated on because of the need of alleviating the condition of debtors at the time. It was intended to be only a temporary law. That there was nothing political connected with its enactment is shown by the fact that in the Senate of the sixth Congress there were nineteen Federalists and thirteen Republican-Democrats, while in the House the membership was fifty-seven Federalists and forty-eight Republican-Democrats, and the vote on the measure was close in each chamber.

By its provisions the law became operative June 2, 1800, for a period of five years.

It was found necessary, in order to provide a system for the United States, either to adapt the English system so as to conform with or to amend the Constitution. While preserving the principal features of the English statutes, such as a purely compulsory law embracing traders liable under the same acts as in England, this initial American legislation introduced some modifications. In the main it was a consolidation of the British statutes. One of the purposes of the administration seems to have been to aggrandize the Federal courts while extending Fed-

¹⁸ Ibid. 247, 389, 534.

¹⁹ Ibid. 534, Feb. 21, 1800.

eral control of government. This constituted one of its weaknesses, for at one time the only occupation of the judges of the United States Courts was to hear bankruptcy causes, and at intervals go on foreign missions or hold other executive appointments.²⁰ The first of the Federal bankruptcy acts, like a law discharging debtors from prison, alleviated the condition of merchants and speculators who had been ruined in the late panic, "and proved a mere sponge for enabling the debtors to wipe out at their creditors' cost what they owed them."²¹ Other causes of its failure and early repeal were its obvious design to protect creditors, which it failed to accomplish and thus disappointed all classes; the sparseness of the population, coupled with slowness of travel, and the scarcity of Federal courts. Its early repeal was predicted by President-elect Jackson.

The law had been passed to relieve a crisis and had served its purpose. In the early days of the session of 1801, Mr. Harper presented a bill to amend the law and continue it in force. It had many enemies. But a bill to amend it passed the House, pursuant to which a committee was appointed which made an unsatisfactory report. The House went into a general discussion of such latitude as should have been conducted in the committee of the whole. Reports of constituents were read; the argument was advanced that perfection was not to be expected in the first attempt, and experience alone could mature the subject. Some claimed that the law had benefitted trade, and others that its affect had been the reverse; while others declared that any arguments on the merit of the system were premature. If, in some respects, it was defective, the evil could be remedied. Mr. Smilie, of Pennsylvania, said that there should never have been a bankruptcy law; but since it existed, on account of the dealings depending on it, if repealed before its term, great mischief would result. Although the law in itself was not considered *ex post facto*, many thought that a law repealing it would be open to that charge. It neglected the agricultural interests, it had fostered preferences and frauds without end; some considered it too inefficient to be remediable by amendment, and at the other extreme

²⁰ Schouler, "History of United States," II, 26; also I, 468.

²¹ Ibid. I, 468.

were those who would have preferred the system unaltered and perpetuated. Some remarked that an honest farmer could work off all possible debts in a few seasons. A desired amendment was that the adjudged bankrupt should not be entitled to his commission until twelve months after adjudication. One of its most bitter opponents declared that, "There had never been a law which produced more iniquity and fraud, and he knew of no business before the House more pressing than a repeal or amendment of it."²² At this time the idea was entertained of extending the benefits of the law to all classes of citizens who were indebted beyond a certain amount. The provision of the law of 1800 allowing the honest debtor whose assets paid certain dividends, [3% to 10%], was disapproved. This was especially unpopular in contrast with the State insolvency laws. It was claimed that the system of England, a commercial country, could not be made serviceable in United States, an agricultural country, and in this Country the method of handling failures by the State insolvency laws was strongly advocated. The most general objection to it arose from its limitation to the affairs of the merchants of the country.

The matter of repeal was postponed until the next Congress convened in 1803. On November 4, Mr. Newton introduced a bill: "*Resolved*, That the act entitled an act to establish a uniform system of bankruptcy throughout the United States ought to be repealed." It was referred to the committee of the whole and made the business of the day on the 21st of that month. An engrossed bill repealing the law was read the third time and passed on the 28th. The same bill had passed the Senate on the 13th, and it was approved by the President, with the proviso that, the repeal of the act should not affect the execution of any commission of bankruptcy issued prior to the passage of the repealing act.²³

Immediately after the repeal of the act, each State either was automatically provided with a relief law, which had been sus-

22 For an excellent treatment of the defects of the law of 1800, cf. speeches of Messrs. Newton, Elliot, Smilie, Hastings, Stanford and Randolph. Those favoring it were, Messrs. Jackson, Early, Skinner and Eustis. "Annals," 8th Cong. 1st sess. 616 et seq.

23 "Annals," 8th Cong. 1st sess. 557, 631, 215, 249; repealed Dec. 19, 1803. 2 Stat. L. 248.

pending, or set to work to enact one, a proceeding which had been anticipated.

Justice Story called the law of 1800 an excellent one, and lamented its repeal. He wrote, "It is extraordinary that a commercial nation, spreading its enterprise through the whole world, and possessing such an infinitely varied internal trade, reaching almost to every cottage in the most distant States, should voluntarily surrender up a system which has everywhere enjoyed such general favor as the best security of creditors against fraud, and the best protection of debtors against oppression."²⁴ Although the law of 1800 was far from adequate, it was a vast improvement on the method of State control preceding its enactment and revived after its repeal.²⁵

²⁴ "Commentaries on the Constitution," II, 51. Cf. "Annals," 1802-3, 376, 530, 546; 1803-4, 107, 258, 557, 616, 621, 1249.

²⁵ Cf. Cooper, "The Bankrupt Law of America, Compared with the Bankrupt Law of England." (1801).

CHAPTER VIII.

THE LAW OF 1841.

From 1804 until 1840 was the era of State insolvency laws. The distress of that period was unprecedented in the history of the Country. Proposals for a Federal law on bankruptcies were seriously agitated in the Congress in 1820, 1821 and 1840. About the year 1809 great commercial losses resulted from the embargo on trade with France and England. In 1811 the charter of the First United States Bank had expired and the circumstances caused great financial stringency until the Second United States Bank was chartered in 1816. The "Wildcat" banks added to the disorder. It is recorded that at one time there were in the country three hundred and twenty-six persons imprisoned for sums of ten to fifteen dollars, and five hundred and ninety-one for an amount less than ten dollars.¹ The condition of the commercial interests of the United States, due to conflicting State laws, has been described.² During the troubled condition of the finances of the country from 1812 to 1820 the enactment of another bankruptcy act was agitated, but it failed to receive the sanction of the Congress. Lack of a suitable protective tariff at that time in the growth of the Republic is alleged to have added to the desperate state of affairs. So great was the suffering and the number of the sufferers that the only relief was some means of releasing the unfortunates from prison. The Congress could not be brought to pass another bankruptcy law; the philanthropists of the country resorted to the abolishment of imprisonment for debt.³ Commerce was in a deplorable condition. Even the treasury of the United States was bankrupt on November 27, 1814.⁴

The distress in all sections was intensified by the refusal of

1 McMaster, III, 415.

2 Supra, pp. 125-33.

3 Benton, I, 415 et seq.

4 Cf. Letter of Secretary of the Treasury Dallas to William Lowndes Adams, "Hist. of U. S.," VIII, 213-15, 244.

President Jackson to approve the bill to re-charter the United States Bank. Jackson's veto of the measure was no surprise, for he had expressed his determination to do so in his message to the Congress in December, 1829. The unwillingness of the administration to continue what was considered a menace to National liberty and positively unconstitutional in his opinion made it necessary to withdraw public funds from the bank. In most cases they were distributed in instalments among the "pet banks," selected by his friends. The share of Pennsylvania was devoted to incorporating the old institution as the Pennsylvania Bank of United States. The absence of a National Bank gave the States an opportunity to charter and control banks, which they abused.

Throughout all the States there were two antagonistic parties which hesitated at nothing that would advance their cause, one favoring the re-charter of the bank, and the other, the President's party, determined to "slay the beast." The resultant financial and industrial panic, although artificial and criminal in its inception, nevertheless required relief. The panic was of partisan make and was deliberately planned, but it got beyond the control of its manufacturers. Loans and accommodations were discontinued at the central bank and all its branches, and simultaneously with the stoppage of resources, business men were called upon for the payment of all that they owed. A loan is recorded of \$1,100,000 to a broker engaged in making distress and relieving it at the premium of $2\frac{1}{2}\%$ per month for the promise of political support. The extent of the disorder is shown by four volumes of about one thousand pages each among the debates of the Congress.⁵ The effect of Jackson's refusal to sign the bill re-chartering the bank is considered one of the causes of the law of 1841. Another cause of public calamity and the need for relief laws arose from the debt of twenty-three millions of dollars to the Government for public lands. The debtors were no small proportion of the population and mostly inhabitants of the new States and Territories, whose resources were almost undeveloped. On account of the great stimulation, the delusive prosperity after the War of 1812, and an organized endeavor to develop the new territory, the banks offered the funds to prospectors and

5 Benton, I, 415 et seq.

the Government disposed of lands at what then appeared to be easy rates. Any one who could procure the money for the first payment of land sold at the usual rate of two dollars per acre, could pay the balance in four annual instalments. There was in the grant a condition of forfeiture of all prior instalments in case that the successive ones were not promptly paid. The banks, which had been depended upon to take care of the settlers, failed, and when the instalments came due, they were defaulted. Financial conditions throughout the country, on this account, became deplorable. Some relief was obtained by changing the condition of sale from a credit to a cash basis; by reducing the price to one dollar and twenty cents per acre, and by making these new terms available to prior purchasers. Nevertheless, great financial embarrassment continued.⁶

To alleviate this state of affairs, an earnest endeavor was made in 1826 to enact another bankruptcy law. A draft was introduced in the Senate during the session 1825-26 and debated acrimoniously. Mr. Hayne, of South Carolina, strongly favored it and made every effort to secure its passage. Senator Van Buren, of New York, opposed it, especially the ninety-third section, as an insolvency measure, and not within the power of the Congress, but one of the residual rights of the States. Mr. Woodbury, of New Hampshire, spoke for a clientele which opposed the law because of the evils of its predecessor, and because it was designed to embrace others than traders, contained the voluntary feature and was capable of violating contracts, a power which he denied to the general Government as well as to the States. It was evident to the promoters of the law that it could not be passed, and the session came to an end with the Country in the same state as when the Congress convened.⁷

There were repeated attempts during the administration of Van Buren to enact a bankruptcy law to relieve the disastrous results of the Jackson regime, which had thrown so many enterprising people into helpless indebtedness. One of the provisions of President Van Buren's plan to restore the commerce of the Country to prosperity after the gloom of 1837 was the making of

6 Ibid. Vol. II.

7 Cf. Elliot, "Debates," IV, 479, 490, 493.

a bankruptcy law applicable to corporations and banks. This was recommended in his first message to the Congress, which was successfully controverted by Daniel Webster, the opposition leader, analyzing the message in his speech on the *Payment of the Fourth Instalment of the surplus Revenue*.⁸ It was the President's object to apply the power conferred on the Congress in regard to bankruptcies to currency legislation through the means of an amendment to the bankruptcy bill proposed by Senator Clayton, of Delaware.⁹ Webster demonstrated that there was another method of controlling banks and corporations, and that the President's plan disregarded the ordinary and existing tenets of such a law and tended to the perversion and abuse of legislative power. He termed the President's purpose "naked unconstitutionality."¹⁰

The valuation and exemption laws of the States were numerous, and in every case were passed to meet the urgent demand of the people. Statesmen realized that some permanent legislation was needed. There was great political excitement throughout the Country in 1840 and 1841. The commercial revolution which had started in 1837 had not yet subsided. It was the period of the Dorr Rebellion, the struggle for the re-establishment of a National bank during the administrations of Harrison and Tyler and the Currency Distribution Bill. According to Nile's Register, the financial affairs of the Government as well as that of the citizens was wretched at that time. The deficit of the treasury for 1841 amounted to \$627,558.90, and had increased in 1842 to more than \$13,000,000¹¹. Duties were increased to twenty per cent.; the proceeds of the sale of public lands distributed; a National banking system established, and a new Federal bankruptcy act was passed. These formed the occupation of a special session of the Congress in the summer of 1841. Benton claims that the National Bank Act and the Currency Distribution Bill were passed by this session only by conceding a bankruptcy law, which was not in Clay's program, but was supported and de-

8 "Works," "Speech on the Payment of the Fourth Instalment," etc.

9 In addition to the panic of 1837, some States at that time repudiated debts incurred for public improvements.

10 "Speech on the Payment of the Fourth Instalment," etc.

11 LXI, 274-5.

manded by a multitude of insolvents throughout the Union.¹² This act was commonly called the Great Whig Bankruptcy Act, and was lauded by the Whigs as a wise and beneficent measure.

The law of 1841 was largely the work of Daniel Webster, who, as Senator from Massachusetts, drafted and proposed the measure. Webster, Calhoun and Benton were the chief debaters of the measure in the Congress. Its only limitation in application was to natural persons. There was an earnest endeavor to extend the privileges to artificial persons, but this effort was bitterly opposed, and in order to have the Congress pass some relief measure, the promoters of the bill had to be content to omit corporations. This law introduced the principle of voluntary bankruptcy into our legislation, and its advantages extended to all persons residing in the United States and not owing debts contracted in a fiduciary capacity. Its provisions were not enforceable against others than merchants, bankers, brokers, factors and underwriters. The law was substantially for the benefit of debtors and was originally reported as a purely voluntary measure. This act was passed August 19, 1841,¹³ and went into operation February 2, 1842. It was repealed by the same Congress about eighteen months after its enactment.¹⁴

The leading features of the act constitute its contribution to the bankruptcy legislation of the country. At that period was introduced the principle of voluntary petitioning, eight years before the same doctrine entered the English laws. The new act divided bankrupts into two classes. In one were comprehended all persons whatsoever, merchants, farmers and mechanics, whose debts were not the result of defalcations as a public officer, guardian, trustee or administrator. Members of this class might petition the United States District Courts and obtain the benefits of the act. In the other class were included merchants, bankers, factors, brokers and underwriters only, whose indebtedness amounted to two thousand dollars or more. Members of this latter class could not institute proceedings in their own affair. A creditor of this class to whom five hundred dol-

¹² "Thirty Years in the United States Senate," II, 229-31.

¹³ 5 Stat. L. 440. The Senate vote was 26 to 23, and in the House it was 110 to 106.

¹⁴ 5 Stat. L. 614.

lars or more was overdue, could petition the court, and have the debtor adjudged an involuntary bankrupt if he should have committed any one or more of five acts. The acts were all based on fraud, *viz.*, if he should flee the State or Territory in which he lived, in order to defraud his creditors; hide or conceal himself to avoid arrest; remove or conceal his goods to prevent their being taken in execution; cause himself to be arrested or his goods or chattels to be seized; or made fraudulent sale, assignment, gift, conveyance or transfer of goods, chattels, lands or tenements. The law was retroactive in the discharge of the contract, interdicted preferences and permitted the discharge of all debts with the assent of the majority of the creditors in number and value of claims.

By the terms of the act it was to take effect on the first day of February, 1842, but scarcely had it been passed before severe criticism arose. Some clamored for its repeal before it began to operate, especially the creditors who realized that it would invalidate their claims. In the regular session of 1841 thousands of petitions poured into the Congress, claiming that the voluntary feature made the debtor the plaintiff and his creditors the defendants. It was criticised because by the mere operation of the law irrespective of whether the creditors received any portion of their claims, the debtor could be discharged. Strict constructionists called it an insolvency law, which the Congress had no power to pass, and which ignored the State laws. Other petitions set forth that it impaired the obligation of contracts by releasing debtors without payment or the consent of the other party to the transaction, and hence unconstitutional. "It is impracticable and cannot be carried out; immoral and corrupting in its effect; will promote a wild spirit of speculation; is not called for by the needs of the country; will make times harder by throwing on the market hundreds of millions of dollars of bankrupt property. . . ."¹⁵ Thus, while some prayed that it be repealed before it would begin to operate, others petitioned that it become effective, some that it be amended and some that it be enforced during the period for which it was enacted.

In the halls of the Congress the same arguments were heard.

Webster defended his bill against all opponents. He explained that the voluntary features served to protect the rights of the creditors, because every debtor would be inclined to petition for relief when he realized that his losses were irretrievable.¹⁶ Under the purely involuntary law, which offered no hope of reward for honorable and timely admission of the condition of affairs, he cited many examples, especially those resulting from the great fire in New York City, in which the creditors had sustained a disadvantage. Webster thoroughly demonstrated that it would prevent over-trading and false-credit, because creditors would be more cautious. Also it would nullify the abusive practice of endorsement and suretyship upon the promise of preference, allowed by the common law but forbidden by the *pro rata* distribution of the fund under the new law. Webster, like Calhoun, did not favor bringing the banks under the provisions of the law. He said that, if the banks were to be dealt with at all, their case would require many peculiar provisions, and they should constitute the subject of a special bill.¹⁷

Calhoun violently opposed the measure as an encroachment on States' rights. In his usually logical way he developed the distinction between a bankruptcy and an insolvency throughout English and colonial history, the one arising from the debtor side of the relation and the other from the creditor side. He insisted that the framers of the *Constitution* were aware of this distinction and in limiting the grant in the *Constitution* to bankruptcies alone, they intended to retain jurisdiction of insolvency cases to the States. He implied that the clause on bankruptcies, standing in the group designated for the protection and cultivation of trade, should be restricted to those engaged in trade, and no other law, such as an insolvency law, should be applicable to such cases. The failure of farmers, mechanics and others, was not the concern of the commercial interests of the Nation, but of localized sections, and, for the disposition of such occurrences it was the purpose of the Constitutional Convention to reserve the power to the Commonwealths. Therefore, since the Congress has not power to pass an insolvency law, and this was an

¹⁶ "Works," V, 27.

¹⁷ *Ibid.* 2-25.

insolvency law, because it affected others than traders, he concluded that it was unconstitutional. He drew other evidences of its illegality from the fact that during a period of fifty years the law-givers of the Nation had made but one feeble effort to legislate under the grant, and assigned as the reason, the consciousness of its unconstitutionality. From this he inferred public disapproval of a Federal law and acquiescence in State laws.¹⁸

The hostility of Calhoun to the subjection of banks to the National law was better founded. The same reasoning, to an extent, applies to-day, both to banks and corporations. He said, to do so would be bankrupting by the wholesale. At that time there were upwards of nine hundred banks with a capital of approximately three hundred and fifty millions of dollars, and with debts due them of more than two hundred and seventy millions, with a supply of specie in the country but little exceeding thirty-three millions. If the laws affected banks, this vast amount of indebtedness would be involved along with that of corporations for manufacturing, commerce, insurance and other lines of industry, which would add to the bulk of this indebtedness hundreds of millions more. In times of great public calamity all these funds and this property would be sequestered and tied up by Federal courts, and would have to be converted into the scant supply of specie, for the credit notes of a suspended bank would be valueless. He viewed with dread the condition after the subsidence of the disaster. Then all these banks and corporations would be under the immediate control of the Federal government.

Considering the corporations, he based his objections on their physical construction, or rather the lack of anything tangible upon which the provisions of the act could operate. There is scarcely a single act of the whole process, beginning with the acts of bankruptcy and extending to the discharge, applicable to them. Of course, this refers to the law at that time. They can

¹⁸ He concluded thus: "If I mistake not, it might be safely asserted that there is not one among them [states' rights advocates] who would yield the power to this government, if he believed that the State legislatures would apply a remedy. I, on my part, neither assert nor deny that they can; but I do assert, that if the States cannot discharge the debt, neither can Congress." "Works," III, 512; cf., also, *ibid.* 506-31.

not depart from the State, be arrested, imprisoned or escape therefrom. If they stop payment they would lay themselves open to the act; but a corporation can not be put under oath. It can not be accorded the usual discharge, for the process is dissolution and death to the corporation. This argument was ended by reference to the conflict between the operation of the Federal bankruptcy law and the charter privilege of a corporation. He called attention to the fact that in *McCulloch versus Maryland*¹⁹ the Supreme Court of the United States had enjoined a State's taxing a fiscal institution of the General Government, and the General Government had no right to expect that the States would permit interference with their chartered institutions. Calhoun considered the whole project, including the bill and amendment, unconstitutional, except the provision governing compulsory bankruptcy as far as it related to individuals, and that, under the circumstances, he considered highly inexpedient.²⁰

Henry Clay spoke in favor of the act in the Senate on January 17, 1842. He stated that, under the administrations of Jackson and Van Buren there was a numerous class of enterprising men who had been ruined beyond hope of relief, except by a bankruptcy law. In such case it would seem to be a humane law, although it might be unjust to the creditors on account of the undue advantage which would be taken by some not entitled to its benefits. His constituents as well as numerous petitioners from New York, Maryland, Pennsylvania, New Jersey and Massachusetts, did not wish the law's operation to be impeded. He rebutted the objection that the bankruptcy bill, if permitted to operate, would throw hundreds of millions of dollars worth of property on the market at a sacrifice, by calling attention to the fact that under the jurisdiction of the common law or the State insolvency laws, the same amount of property would fall under the hammer of sheriffs without competition to raise the price or the creditors' obtaining a proportionate share of the proceeds of the sale. The appalling condition of the country, in his opinion, demanded the law; hopeless debtors were depending on it to re-

¹⁹ 4 Wheat. 316-437.

²⁰ "Works," III, 506 et seq.

lieve them of their misery, and the business men of the country were arranging their affairs in conformity with it.²¹

The leading features of the law were to be tested in the Supreme Court. The retroactive principle was reviewed in the case, *In re Klein*.²² The decision of Justice Catron in the United States Circuit Court in this case was:

"The power of Congress extends to all cases where the law causes to be distributed the property of the debtor among his creditors, this is its least limit. Its greatest is the discharge of the debtor from his contracts, and all intermediate legislation, affecting substance and form, but tending to further the great end of the subject, distribution and discharge, are in the competence and discretion of Congress. With the policy of the law, letting in all classes, others as well as traders, and permitting the bankrupt to come in voluntarily and be discharged without the consent of his creditors, the courts have no concern; it belongs to the law-makers." The same question was similarly decided in *Kunzler versus Kohaus*²³ and *Sackett versus Andross*.²⁴ "Bankruptcies applies to all persons unable to pay their debts,—the power of the Congress is not restrained to any particular mode of discharge, voluntary or involuntary; it can relieve antecedent contracts as well as those entered into subsequent to the passage of the law; and the *ex post facto* prohibition of the Constitution refers to criminal offenses only."

The law was repealed by a decisive vote March 13, 1843.²⁵ It must not be denied that it favored debtors and was the subject of great political contention, for its effect and the struggle in the Congress over its repeal prove this. In the short space of its existence, thirty-three thousand, seven hundred and thirty-nine debtors availed themselves of its provisions. More than twenty-eight thousand debtors had been relieved of nearly four hundred and forty-five millions of dollars of obligations by the surrender of less than forty-five millions of dollars worth of property which was distributed among a million and forty-nine thousand

²¹ "Speeches of Henry Clay," Colton, 1857, II, 297 et seq.

²² 1 Howard 277, in notis.

²³ 5 Hill 317.

²⁴ 5 Hill 327.

²⁵ 5 Stat. L. 614.

creditors.²⁶ According to McMaster, there were forty-two thousand persons who petitioned against the repeal of the law, one thousand two hundred and six begged for a modification of it, and only four hundred and forty-seven for its repeal or postponement. The law permitted each judge to lay down the practice in his proper court and this was one of the causes of its failure.²⁷

²⁶ "Speeches of William Pitt Fessenden;" also, McMaster, VII, 49.

²⁷ Cf. Biddle, "The Bankrupt Law passed 19th August, 1841, with notes. Bicknell, "A Commentary on the Bankrupt Law of 1841, showing its Operation and Effect, Copy of Law, Forms and Tables of Fees."

CHAPTER IX.

THE LAW OF 1867.

After the repeal of the "unsuccessful and obnoxious" act of 1841, neither the debtors nor creditors of the country wanted another bankruptcy law. For a long time they preferred to invoke the State laws and the general practice. The need of relief, which arose with the reaction from the discovery of gold in 1848 and the panic of 1857, was thus filled by State authority. Because of the extensive harm which it had done to their party on account of its unpopularity, the law of 1841 was odious to the Whigs who had promoted it. It left a stigma on nearly all who had benefitted by it. Representative Cravens, of Indiana, opposing the enactment of a new law declared that, in his precinct, there was no insult that a man would more quickly resent than the allegation that he had taken advantage of the bankruptcy act of 1841. Mr. Cravens, who represented an agricultural district, as late as 1864 could see no need of a new law to regulate bankruptcies. He made the remark that any man who could not pay fifty cents on the dollar did not deserve the benefits of a law, and at that time, owing to the depreciation of paper money, a debt could be readily discharged at one-half of its original amount, and this was sufficient relief for any one, even the merchants of New England.¹ In the Southern States the ratio of specie to paper was one to a thousand. In the commercial section of this country conditions were more critical than at any time in its history. Thousands had been ruined in the panics of 1853 and 1857; and thousands of enterprises were ruined by the repudiation in 1860 of Southern debts.²

The New York *Tribune* of September 18, 1862, complains of the effect of repudiation. "New York was largely a creditor of the South, and rebellion was held by debtors throughout the seceded States as a receipt in full for the amount of their obligations. Not that a part of them have not professed and perhaps

¹ "Congressional Globe," June 8, 1864, 2010.

² McMaster, VIII, 286.

cherished a vague intent to pay some time or other, but there was no solace in this for the present sufferings of our prostrated merchants. Not less than \$200,000,000 of Southern indebtedness to our city was blotted out as in a single night, . . . trade, of course, sank for a season to zero." President Lincoln noticed the calamity in his message to the Congress in December, 1861. He said, "There are no courts to whom the citizens of other States may apply for the enforcement of their lawful claims against the citizens of the insurgent States, and there is a vast amount of debt constituting such claims. Some have estimated it as high as \$200,000,000 due in a large part from insurgents in open rebellion to loyal citizens who are even now making great sacrifices in their patriotic duty to support the government."

In 1860 the liabilities of those in the north who had failed amounted to \$62,000,000, while the following year 6,520 business-houses,⁴ 2,000 more than during the panic of 1857, failed with liabilities of \$193,000,000. Banks of the west which had connections with the south nearly all failed. Thirty-seven failed outright, and eighty-one out of a hundred and ten were compelled to suspend business in Illinois. The next year only seventeen banks, with a total circulation of \$400,000, remained solvent. In Wisconsin thirty-nine failed, while there were twenty-seven failures in Indiana. Before long the ruin extended to all the eastern States. Southern trade was destroyed; cotton, which constituted the principal export of the country, was no longer available. In some localities flour sold for \$400 per barrel, tea for \$5 per pound and shoes for \$25 a pair. It was repeatedly asserted that in 1864 over 100,000 hopeless debtors longed for relief in the loyal States of the Union. Mr. Ward, of New York, read a careful report on the condition to the Congress.⁵ At the outbreak of the war, merchants in the south owed merchants of the north over \$300,000,000 of which \$159,000,000 were owing to those of New York, \$24,100,000 to Philadelphia creditors, \$19,000,000 to Baltimore business houses, and \$7,600,000 to those

³ In the 2nd session of the 38th Congress Senator Sumner, of Mass. offered a memorial setting forth that debts of \$200,000,000 were due to the North from citizens of rebel States, and he pleaded against the enactment of a bankruptcy law before those debts were collected. p. 292.

⁴ "Congressional Globe," 38th Cong. 1st sess. 2723 et seq.

⁵ "Globe," 38th Cong. 1st sess. 2723 et seq., June 3, 1864.

of Boston. The annihilation of these assets caused widespread and undeserved insolvency. There were nine hundred and thirteen mercantile failures in New York with liabilities of each failure in excess of \$50,000. Of two hundred and fifty-six flourishing dry-goods firms of that city in 1860 but sixteen remained solvent. Between the years 1857 and 1863 there were 25,391 failures for amounts exceeding \$5,000. The total liabilities of these failures exceeded the assets by \$761,961,264.⁶

There were received by the thirty-seventh Congress forty thousand petitions for the enactment of a bankruptcy law. A graver state of affairs was anticipated from the reaction after the Civil War, when creditors before complacent would expect their debtors to be in better condition to pay their obligations. This crisis could be foreseen and prevented by an adequate law. In the process of reconstruction, the chief features of the constitutions which the returning States drew up were the abolition of slavery, the rescinding of the ordinances of secession and the repudiation of their debts. While this repudiation did not directly affect the north, indirectly it was felt in all parts of the country.⁷ Thus an industrial and commercial calamity overtook the nation at the time of its greatest political crisis. The Congress was much occupied during the prosecution of the Civil War

6 By some authorities it was placed as high as \$400,000,000. Cf. "The Confederate States of America: Financial and Industrial History," by J. C. Schwab; also, Fite, "Social and Industrial Conditions in the North During the Civil War," 108.

For conditions in the South during this period, cf. Wiley & Rines, "The United States," IX, 351. The following is the report of R. G. Dunn & Co., for the years of the War:

Year	Failures in North	Amount	In South	Amount
1857	4257	\$265,818,00	675	\$25,932,00
1858	3113	78,608,747	1112	22,140,915
1859	2959	51,314,000	954	13,080,000
1860	2733	61,739,474	943	18,068,371
1861	5935	178,632,170	1088	28,578,257
1862	1052	23,049,300	(unknown)	

7 By the convention at Little Rock, January 22, 1864, Arkansas adopted an amendment to the Constitution, by which "the act of secession was declared null and void; slavery was abolished immediately and unconditionally, and the Confederate debt wholly repudiated." McCarthy, "Lincoln's Plan of Reconstruction," 88.

The Georgia Convention assembled at Milledgeville on October 25, 1864, repealed the acts of secession and repudiated the war debt by a vote of 133 to 117. "The war debt thus declared void amounted to \$18,135,775. The necessity for this action is evident; the hardships occasioned thereby can be easily imagined." Ibid. 465, also, cf. 455.

in an effort to enact a bankruptcy law, for it was obvious that it alone could prevent a social revolution after the war. Indeed, nothing but the temporary prosperity arising from the hasty and extravagant manufacture of army supplies prevented another insurrection, an outbreak of the debtor class in the north.

Throughout the entire war period there was a permanent committee in the House, headed by Thomas A. Jenckes, of Rhode Island, which devoted much of its time to the preparation of a bankruptcy law designed to become a permanent part of the legislation of the United States. Until that time there had been no permanent legislation on the subject. In the second session of the thirty-seventh Congress, a bill was introduced by Senator Foster, of Connecticut, "providing for the relief of honest but unfortunate debtors, and the distribution of their property among their creditors, by the establishment of a uniform system of bankruptcy throughout the United States." It was referred to the Committee on the Judiciary, which reported by its chairman, and recommended a postponement until the next session, as there were more memorials, in favor as well as in opposition to the law, than the committee had time to read. However, a rough draft of a law was considered in a committee of the whole on July 14th, after which it was ordered to be printed for the perusal of the members and for the consideration of the business men of the country. The same bill was introduced into the House, but was lost in the committee. Later, January 28, 1862, Mr. Conkling, of New York, introduced a bill which was read twice and referred to as special committee, reported back and ordered printed." It was again brought to the attention of the House by Mr. Arnold on June 9th, but was recommitted and dragged through the session until further discussion of it was defeated by a motion to postpone action until the third Wednesday of December.

In the first session of the thirty-eighth Congress, the Senate was chiefly engaged upon war measures. In the early days of the session a bill for a bankruptcy law was introduced into the House, and a motion carried to appoint a committee of nine

members to consider the subject.⁹ Mr. Jenckes was appointed chairman of this committee, and reported the bill. Five thousand copies were ordered printed. In making the report Mr. Jenckes summarized the bill as presenting unusual claims at a time when all the business interests of the country were in a constant state of agitation. The grant of the power implied its exercise as a duty. He said, the power which is now invoked had been exercised intermittently, at long intervals, to meet exigencies in the business of the country, and the laws had been repealed before they had formed the basis of a system of legislation. In this Country there neither is nor can be any privileged classes which could exclusively enjoy the benefits of such a system of laws. All are liable to insolvency, and all are equally entitled to relief. This was Mr. Jenckes' reason for extending the bill beyond the traditional limit of merchants. His policy of including a voluntary feature was based on the conviction that in most cases, although not formally, the bankrupt's confession of his condition puts in motion the wheels of the law. The tests of insolvency are two; the bankrupt's declaration of the state of his affairs, which is the essence of the voluntary principle, and the creditors' discovery of that state, which constitutes the compulsory form. He said that the aims of the proposed law were the discharge of the honest debtor upon the surrender of his property, and the protection of the creditors against fraudulent practices and the reckless conduct of debtors. The debtor under the common law or the State insolvency laws could not afford to call his creditors together, for the property would be entirely ravaged by the creditors whose claims were earliest due, and the balance of the creditors, getting no proceeds, would refuse a discharge. Another consideration was that the debtor was often influenced to make preferential assignments. To avoid the delay and expense of former laws, jurisdiction was lodged by the twelfth section of the bill in the United States District Courts. An effort was made to give the Supreme Court justices concurrent jurisdiction while presiding in the Circuit Courts, but this was opposed, and it was finally agreed that in case a District Court judge was too busy to dispose of cases in reasonable time, he could employ an assistant.

⁹ Ibid. 38th Cong. 1st sess. 24, 70, 93, 108, 292, 660, 673, 793, 1814, 2636, 2639, 2723, 2741, 2810, 2812, 2835, 2855, 2880.

It began to be realized that too close connection with the Courts was one of the causes of failure of earlier laws on the subject of bankruptcies. Insolvency is a matter between the bankrupt and his creditors. To expedite process a system of registers, accountants and court assignees, appointed by the Court and having extra-judicial authority, was proposed, and became a weakness in the law. These officials had power to conduct the proceedings in the absence of an opposing interest, but if any opposition arose, they committed the protest to writing and submitted the controversy to the judge. This principle originated in the Massachusetts insolvency law of 1833, and was copied into the English code in 1861. Mr. Jenckes was working in the interest of northern commerce, for the commercial sections of the country were most eager and active to obtain a law. Lobbying, by both debtors and creditors, was detected; such intrigues operated delay to the bill.

In the second session a draft which had been agreed upon during the recess was considered, but it was conceded that it could not be passed and put into operation by September 1, 1864, as the framers of the measure had planned. Consequently it was amended to become operative on June 1, 1865. The bill was neglected in that session, but in the following one it was discussed section by section. Almost every provision was opposed by different members for different reasons. Mr. Conkling was the principal objector. In order to qualify as a register, accountant or assignee, it was required that a candidate take the prevalent test oath. After acrimonious argument this provision was stricken out. The Supreme Court rules, the number of officers, and the expense attendant on the execution of the rules were not endorsed. The people, it was claimed, did not want a compulsory provision in the law. Prior enactments had this quality in order to surmount a period of depression; the present measure was proposed as a permanent part of the law of the land. Creditors, it was said, have the writ of replevin, the injunction and the *ne exeat* to protect their property in the possession of others. Mr. Paine, of Wisconsin, carefully analyzed the proposed measure. He criticised the many and excessive fees. Creditors were charged \$20 upon petitioning and debtors \$10. Charges were made for stamps, advertising, mes-

senger service, entries, a discharge fee of \$5, and an assignment fee of \$3. He designated it a uniform law for the collection of debts. Its retroactive feature was defensible because all remedial statutes are supposed to be retroactive. After constant debate during two days, it was decided that the bill was not in shape to become a law, and it was left over for the next session.¹⁰

During the recess, Mr. Jenckes, author of the proposed law, modified the measure to conform to the changes suggested by the debates. The earliest draft left the possession of the insolvent's property in United States marshals until assignees were appointed. Allowances were made for travelling expenses, generally from distant points, as well as for services. In the amended draft was a new scheme to obviate this extraordinary and unnecessary expenses by the use of messengers, local officers of the courts, who would perform the same functions as marshals formerly had done. The plan of using messengers was finally abandoned, and it was proposed to leave the possession of the property in the bankrupt who would be held to strict accountability to the Court upon the appointment of the assignee. This status of title being "in the air," became one of the objectionable features of the law of 1867. An effort was made in the Senate to have registers appointed as permanent county officers by the Chief Justice of the Supreme Court or by the judges of the Circuit Courts, but this plan was rejected by the conference committee of the two chambers.¹¹ On July 23, 1867, Senator Johnson, of Maryland, complained of the procrastination of the Congress and stated that the English Parliament had passed a statute patterned after the law which had been proposed in the sessions of 1862. He saw no reason for Congress after Congress debating a measure that was acceptable to a law-making body which had hundreds of years experience in the subject.¹²

Delay was also occasioned by the exemption clause. For months this portion of the law was agitated in each chamber. Some members considered that the constitutional grant was sufficient to nullify the State laws; others urged that the exemption

¹⁰ "Globe," 39th Cong. 1st sess. 9, 18, 302, 718, 755, 756, 778, 846, 1678-91, 1872, 2655, 2742, 2760, 3804.

¹¹ "Globe," 39th Cong. 4025.

¹² Ibid.

amount of the law be made sufficient to meet that permitted by the most indulgent State, California, which allowed \$5,000. It was contended such amount in California was not more than equivalent to \$500 in Vermont. Extra exemptions were demanded for soldiers who had served in the late rebellion. Others thought that the difficulty could be surmounted by placing a sum, \$500 for instance, at which a discharge would be obtainable, but if the bankrupt did not desire a discharge, he could claim the benefit of his State's exemption. The present theory of the law, that State exemptions are a part and parcel of the contract was also suggested. The debate on this feature closed by a vote to strike out the proviso granting exemptions to the extent permitted by the various States in 1864, and substituting therefor the specified amount, \$2,000. Those who voted against this measure did so because they thought that differing exemptions in the various States would destroy the uniformity of the law. The reply to this objection was that the law was restricted to uniformity in the distribution of the assets of the bankrupt, and to uniformity in the operation of the law as far as it would extend in a positive sense, but if the States desired to allow the debtor to reserve a portion of his property to provide the necessities, comforts and conveniences of life for himself and his family, and to prevent their becoming a burden on the State, a law of the Federal Government could not infringe that right; furthermore it did not militate against the uniformity of the Federal law.¹³

On February 12, 1867, the Senate, after a lengthy and heated debate, came to a vote on the measure.¹⁴ After the Senate had passed the bill, the House took it up on February 15th and discussed the amendments made by the upper body. The fate of the measure had been left by the House in the hands of the conference committee, which recommended the approved bill in its report on February 22. Upon this report, on the same day, the

13 "Globe," 39th Cong. 2nd sess., for debates in House, cf. 708, 1273, 1661, 1707, 584; in Senate, 27, 402, 551, 584, 587, 949, 971, 1002, 1110, 1186, 1374, 1438, 1923, 1949, 1958, 1993.

14 The first vote tallied was 20 to 19 in favor of the bill. Senator Patterson, of Tennessee, was absent during roll call but arrived before the vote was announced and demanded a vote. After some demur it was granted, and he voted in the negative. Senators Frelinghuysen and Cattell, of New Jersey, under the same circumstances, voted with the affirmative.

House took favorable action. It was signed by President Johnson on March 2, 1867.¹⁵

As before noted, the Federal bankruptcy law of 1867 was modeled upon the Massachusetts insolvency law of 1833. It contained both voluntary and involuntary features. The former was applicable to debtors of any description residing in the United States and owing debts to the amount of \$300, who signified to the Court of the district in which they resided during the preceding six months an intention to surrender property for distribution among the creditors. The latter feature was operative upon the petition of a single creditor, or more than one creditor, with a specified claim of \$250 or upwards. The new law had many imperfections. It went to extreme lengths in the enumeration of acts of bankruptcy, defining ten such, and in restrictions on granting discharges. It was unwieldy because of too great attention to details. A great cause of failure of this law was its intricate connection with the Federal courts. Bankruptcy administration does not well fit in with the usual legal procedure. This fact was discovered in England, where the administration of the law was turned over to the Board of Trade. In this Country it was later delegated to a system of administration built up on the business relations of the debtor and the creditor. The Federal courts were not well known to the ordinary lawyer and client, and furthermore, in the case of fraud or crime, it was necessary to resort to the local courts. It is now generally recognized that bankruptcy legislation and administration should be as simple, familiar and easy as possible, and the solution was finally found in referees' courts with quasi-judicial faculties in places and at times convenient to suitors. After distribution of the assets under this law, if they satisfied the claims to the extent of thirty *per centum*, the debtor was entitled to a discharge regardless of the consent of creditors. The creditors could grant a discharge if one fourth of their number, representing one third in value of the claims, acquiesced. This privilege was abused, for discharges were often bought, a practice constituting one of the weaknesses of the law.

¹⁵ 14 Stat. L., 517; 39th Cong. 2nd sess., p. 1273. For text of the law of 1867, cf. "Globe," 39th Cong., 2nd sess., append. 228 et seq.

Through the apathy of some creditors and the avarice of others, the process of the law was impeded. The expense attending litigation and administration were excessive. Creditors could not afford to throw good money after bad, especially an uncertain amount of bad money, for, at the commencement of a case in bankruptcy no one was able to foresee whether, after the fees had been paid and the allowances to the debtor had been made, there would be a remainder or whether the creditors would, in addition to former losses, be compelled to pay the fees which the estate was insufficient to cover. A conservative opinion of the law is that an unnecessary part of the assets was wasted in fees and other expenses on account of the cumbersome and ill-working system. A further cause of complaint was the lack of uniform rules and regulations governing assignees and registers.¹⁶

Even before the repeal of the law of 1867 several amendments had been added which permanently affected legislation. The law contained a proviso allowing the discharge of the debtor in opposition to the creditors if the assets paid thirty *per centum* of the claims. The purpose of this was to remove all wrecks before the new law should be put into operation. This thirty *per centum* provision was to continue for one year after the enactment of the law, but due to the fact that more than six months elapsed before actual practice under it began in some courts, its life was extended several times. Losses by gambling were included among the impediments to a discharge.¹⁷ By another amendment registers were given co-equal power with the commissioners of the United States Circuit Courts to administer oaths.¹⁸ An unsuccessful effort was made to repeal that part of the third section empowering the Courts to appoint registers, and to vest this power in the President of the United States.¹⁹ It was reported to the Fortieth Congress that the provisions of the law were being neutralized by allowing others than the legally appointed officials to administer the law and by the addition of State practices.²⁰ On July 14, 1870, an act was approved which

16 Brandenburg, "On Bankruptcy," 6.

17 "Globe," 40th Cong., 2nd sess., 4448 & 4449.

18 Ibid.

19 Ibid. 3rd sess. 1883.

20 "Globe," 40th Cong., 3rd sess., 152.

so extended the law that a banker, broker, merchant, trader, manufacturer or minor who stopped payment of his commercial paper for a period of fourteen days, whether with fraudulent intent or not, committed an act of bankruptcy.²¹ Bankruptcy legislation had previously noticed only fraud. The procedure of the courts of jurisdiction varied, whereas the law required uniform regulation. In the second session of the Forty-second Congress an act was passed which made the various State exemption laws of 1871 instead of those of 1864 the basis of allowance.²² In the meantime, the re-organized Southern States had adopted new constitutions and the delegations of several had been admitted into the Congress. On May 27, 1872, the law was so amended that a person or corporation could not involuntarily be declared a bankrupt unless the provable indebtedness exceeded \$3,000. It was also provided that a promise to pay a balance after discharge, in order legally to revive the claim, was required to be in writing. This amendment also extended jurisdiction to the Supreme Court of the United States' Territories, and regardless of the percentage paid, prolonged to July 1, 1873, the time limit of discharge.²³

The supreme test of the capacity of the law of 1867 was the memorable panic of 1873 which was due to over-speculation and consequent over-production in almost every branch of industry throughout the commercial world. In the United States the crisis came with the failure of Jay Cooke & Co., of Philadelphia, to realize on certain railroad securities. Between 1873 and 1876 mercantile failures amounted to \$775,000,000, and defaults by railroads to the sum of \$779,000,000. Before the condition had subsided in 1878, 47,000 failures had occurred. The money loss was \$1,200,909,000. The severity and extent of this crisis was aggravated by the insolvency section of the bankruptcy law by which were forced into the financial maelstrom thousands who with a little patience of creditors could have remained in business.²⁴

21 Ibid. 41st Cong., 2nd sess., 5600.

22 Ibid. 40th Cong., 2nd sess., 4187.

23 Ibid. 42nd Cong., 2nd sess., 159, 318, 1525, 3697, 4187, 4219, 4346, 4417, 4475.

24 Cf. Pile, "Wall Street the Morning After"; Hyndman, "Commercial Crises," 100, 120; Dewey, "Financial History," 370-72; Jugler, "History of Panics," 95; Wiley & Rines, "The United States," 440-50.

At the assembling of the Forty-third Congress there were introduced thirteen bills to amend the law and eight to repeal it. The most heroic yet unsuccessful effort at amendment was that made by Senator John A. Logan, of Illinois, to preserve the law by striking out the involuntary feature, which was the chief cause of complaint. During this Congress there were forty-seven petitions concerning the repeal of the law which received formal attention, while hundreds of thousands got no farther than committees. Nearly every member was dissatisfied with the law. Some wanted to amend it, and they were opposed by those who were determined to repeal it. Between these conflicting interests the law continued until the Forty-fifth Congress.

By the opening of the second session of the Congress just mentioned nearly all had realized that successfully to amend the measure was impossible. The Senate by a vote of thirty-eight to six repealed it on April 15, 1878.²⁵ The House, after a short struggle to amend, concurred by an overwhelming vote of two hundred and five to forty.²⁶ The repeal was approved by President Hayes on June 7, 1878. A majority of the people had desired the repeal of this law. For more than ten years a bankrupt's certificate had been legal tender in the discharge of private indebtedness. Senator McCreery, of Kentucky, who introduced the bill to repeal the law, said that, the subject "had been more strongly discussed than any other since the Civil War."

25 "Congressional Record," 45th Cong., 2nd sess., 2512-16.

26 Ibid. 3186, 3316-20, 3353-62, 4232.

CHAPTER X.

THE LAW OF 1898 AND ITS AMENDMENTS, ADOPTED
AND PROPOSED.

The development of bankruptcy legislation after the repeal of the law of 1867 admirably illustrates the maxim that laws follow but never lead public opinion and that government is constantly in a state of mutation. To crystalize either the laws of a country or its social institutions would mean extinction to the government. New laws and new governments are never imposed on an unwilling people, but owe their existence and their strength to the closeness with which they interpret the desires of the governed. The evolution of the laws on bankruptcy during the last fifty years has been, in the main, constant and beneficial. The debates of the Congress incident to the repeal in 1878 of the former law prepared the way for the composition of the far more adequate law of 1898. There are so many things to be provided for in a bankruptcy law that it is almost impossible for the intelligence of even a Congress to grasp all the points which may arise relative to the enactment of such a system of legislation. Time and experience tend to perfect all laws. The process of perfection continued from the time of the Forty-fifth Congress until the assembling of the fifty-fifth without producing a substitute for the repealed law.

In 1882, four years after the repeal of the former law, notwithstanding the disapproval which had influenced that repeal, and in spite of the protest against another involuntary law, a bill possessing that feature passed the Senate by a large majority and lacked only four votes in the House. In every succeeding Congress, beginning with the fifty-first in 1890, some effort was made in one chamber or the other, and generally in both, to have a Federal bankruptcy law enacted. Two events of the era tended to disturb and destroy the business of the country. Between 1883 and 1889 a spirit of speculation had spread over the entire tract west of the Missouri River, and as a result, there were many business failures. The people went wildly into specu-

lations of every sort, over-purchased property, gave mortgages and incurred liabilities at the banks to the limit of their credit. The over-stimulation re-acted, property depreciated in value, mortgages were foreclosed, money was scarce, interest was defaulted, the people were hopelessly in debt and property would not exchange. A panic ensued in 1893. Values were impaired and incomes decreased, business was spasmodic, but fixed charges and taxes for municipal improvements had increased. These things contributed to disaster, and either partially or completely paralyzed every business interest of the country. During the period 1879 to 1896 there were 171,389 failures, an average of 1.02 *per centum* of those in business, for total liabilities of \$2,611,521,704. Representative Burke, of Texas, cited a report of the judiciary committee that, "approximately 400,000 debtors were suffering and absolutely standing in need of some beneficial legislation in this direction when the bill was presented in 1898."¹ In the eighteen years preceding 1897, there had been 186,477 outright failures owing \$2,837,618,538.² To demonetization of silver by the repeal of the Sherman Act in 1893 was attributed the financial and industrial condition. Merchants, especially in the south and west, were overstocked.

Soon after the repeal of the former law thoughtful men engaged in commerce and the industries realized that it was a mistake to deprive the country of bankruptcy legislation, and began a systematic agitation for a new law. The Honorable James Lowell was recognized as a leader in this movement, and he drafted a measure to which his name was given. It was endorsed throughout the country, and under the guidance of Senator Hoar, of Massachusetts, passed the Senate. In the House it failed to obtain the necessary vote. The business interests then turned to Jay L. Torrey, one of the leading bankruptcy experts, and under his direction a propaganda was carried on until the passage of the law of 1898. The Torrey Bill, which provided benefits for both debtor and creditor, and which had been before the Congress since 1889, had great influence in forming the law of 1898. It had as varied and precarious experience in the ses-

¹ "Record," 55th Cong., 2nd sess., 6426 et seq.

² "The Bankruptcy Magazine," June, 1897.

sions of that period as the earlier draft of Representative Jenckes. It was framed in five chapters. The first treated the courts of jurisdiction, and followed, as far as possible, common law procedure with the modification of regular process in equity. It did not restrict jurisdiction to United States Courts, but a suit was cognizable by the most convenient tribunal; trial by jury was preserved, and appeals and writs were according to the ordinary practice. The next chapter embraced the officers, who were the judge, trustee and marshal; the third considered and defined bankruptcy; while the fourth and fifth defined the rights of creditors under the act, and provided for the disposal of the estate. Dishonest conduct and hopeless insolvency were the basis of the acts of bankruptcy. The doctrine underlying discharge was that no dishonest debtor could be relieved of liability, while for the honest but unfortunate debtor it afforded every facility. It required that application for a discharge must be made within six months, and corporations could not be discharged because they had not the same necessity as individuals. The measure did not attempt to interfere with State exemption laws.³

By the middle of the first session of the Fifty-fifth Congress the need for some relief measures was imperative. The Senate, always conservative, opposed another involuntary law and passed a voluntary bill, which was reported to the House and referred to a committee.⁴ It slumbered in this committee for almost a year, but finally was reported with a revision including an involuntary section. This was in conformity with the draft of Senator Nelson, of Minnesota. The principal objections to this bill were its similarity to the preceding law; the cost of administration appeared to be excessive, and in the matter of security to creditors and the prevention of evasions it seemed as wholly inadequate as its predecessor. Four of the proposed acts of bankruptcy were at that time the basis of attachment in every State of the Union, and the proposed bill would serve only to transfer jurisdiction from the State to the Federal Courts. The States had amply covered the collection of debts and there was no need for an involuntary law. Every member who spoke in the debates of the Fifty-fifth Congress admitted a demand for some

³ "The Bankruptcy Magazine," June, 1887.

⁴ April 23, 1897.

bankruptcy law, although he may have opposed one of the three views; a purely involuntary law, an involuntary law or a moderate system embracing both.

The matter of bankruptcies again received serious consideration in the closing days of this Congress. The Torrey Bill was severally arraigned by Senator Stewart, of Nevada, who said that its involuntary feature was based on the assumption that every man who was embarrassed and could not pay his bills was a criminal. By the proposed bill a bankrupt had to bring suit in order to get a discharge, and any creditor who failed to file his claim could present it within a year after adjudication, thus keeping the unfortunate one in anxiety. The Senator also objected to an added act of bankruptcy, which required the debtor's presence at his place of business within forty-eight hours of the filing of the petition. Senator Stewart was opposed to the passage of any measure before the Congress should provide the debtors with "honest dollars," *i. e.*, silver dollars, with which to pay their debts.⁵

At the same time the Nelson Bill was presented and discussed. It was an involuntary measure with the exception of two cases, namely, transfer of property with intent to defraud, and transfer with intent to prefer. The House passed a modification of the Torrey Bill, elaborating administration rules, in which respect the Nelson Bill was weak. A contention arose between the two chambers over the grounds of involuntary bankruptcy, the offenses for which the bankrupt could be imprisoned and the limitations and restrictions on discharge. The House bill made the impediments to discharge so stringent as to render the discharge of any bankrupt impossible. In this situation a conference was requested by the House. After deliberating many weeks the committee failed; upon this, a sub-committee was chosen and worked out a compromise which afterward, June 15, 1898, came before Congress. The conference, which had worked continuously for three and a half months submitted the House bill with twenty-two of the seventy sections altered to conform to the Nelson Bill. This augmented the acts of bankruptcy of the Senate document by adding three, namely: a preference

⁵ "Record," 55th Cong., 2nd sess., 2312.

suffered through legal proceedings, general assignments, and admissions of an insolvent condition in writing. The commission of an indictable act, of perjury or the failure to keep books, or the falsification of them for the purpose of delaying or defrauding creditors, constituting embezzlement, were made punishable by imprisonment. Insolvency under the old laws and those of the States meant inability to pay debts in the usual course of business, but the proposed bill adopted the new principle that, insolvency exists when the provable debts exceed the assets. Upon inquisition the debtor was held to establish his solvency. The bill permitted any one owing debts exceeding \$1,000, excepting corporations, to take advantage of the law by voluntary petition, but in an involuntary action National banks and State banks or corporations, except those engaged exclusively in manufacturing and mercantile pursuits, printing and publishing, as well as farmers and wage-earners of less than \$1,500 *per annum*, could not be made answerable.

The report was made to the Senate on June 15, 1898, and the bill was passed on the 24th of the same month. In the House, Representative Terry denounced it as a Federal attachment law, and insisted that if it passed, there was no reason for opposing preferences, for, some debts are by their nature entitled to preference. However, on June 28, it passed the House and was signed by President McKinley on the first of July.⁶

In 1902 an effort to repeal this law failed by a vote of two to one. The fact that it was not entirely adequate and had several loop-holes was generally conceded; for this reason in the Fifty-seventh Congress a concerted effort to amend the statute was successful. On January 6, 1902, Senator Cockerell, of Missouri, introduced the bill to amend the law, which was referred to the Judiciary Committee. Senator Nelson reported for that committee, whereupon the Senate considered the report section by section, and passed it, January 21, 1903. The objection in the House was that the bill permitted a waiver of the State exemption laws made at the time of entering into the contract to be repudiated in the bankruptcy court. This was allowed in the

⁶ "Record," 55th Cong., 2nd sess., 233, 1777, 1832, 1836, 1860, 1885, 1923, 1938, 1947, 2262, 2312, 2358, 2407, 2411, 5960, 6064, 6296, 6426, 6517, 6553, 6568.

amendment as passed. Without much debate on the main issue the bill passed the House on February 7, 1903.

The next amendment originated in the lower house and was directed principally at the sixty-fourth section of the law of 1898. It reads: "Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That clause four of subsection *b* of section sixty-four of said act is hereby amended to read, '4, wages due to workmen, clerks, traveling or city salesmen or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant.'" The preferential payment of wages had been made a part of British law by a statute of 1888.

The amendments to the law of 1898 by the acts of February 5, 1903, June 15, 1906, June 25, 1910, and March 2, 1917, will now be considered. The first section of the amendment of 1903 provided that the bankruptcy of a corporation amenable to the act shall not release its officers, directors and stock-holders, as such, from any liability under the laws of a State, a territory or the United States. Section fourteen, in regard to the granting and refusing of discharges, was amended by changing the first words of the second clause; "with fraudulent intent to conceal his financial condition, and in contemplation of bankruptcy," to read; "with intent to conceal his financial condition," and by adding clause four, as follows: "or obtained property on credit from any person upon a substantially false statement in writing made to such person for the purpose of obtaining such property on credit; or at any time subsequent to the first day of the first four months preceding the filing of the petition transferred, removed, destroyed or concealed any of his property with the intent to hinder, delay or defraud his creditors;" in voluntary proceedings been granted a discharge in bankruptcy within six years; or in course of proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court." The provision was also added that a discharge in bankruptcy shall release from all provable debts, except such as are for "alimony due or to become due, or for the maintenance or

support of a wife or child,⁸ or for seduction of an unmarried female, or for criminal conversation.”⁹ This phase of the law was extended by the amendment in 1917, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 17 of an Act entitled ‘An Act to establish a uniform system of bankruptcy throughout the United States,’ approved July first, eighteen hundred and ninety-eight, as amended February fifth, 1903, be amended so as hereafter to read as follows:

“‘Sec. 17. Debts not affected by discharge. A discharge in bankruptcy shall discharge a bankrupt from all of his provable debts, except such as (first) are due as a tax levied by the United States, the State, county or municipality in which he resides; (second) are liabilities for obtaining property by false pretences or false representations, or for wilful and malicious injury to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of any unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; (third) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (fourth) were created by fraud, embezzlement or defalcation while acting as an officer in any fiduciary capacity.’”

Another section of the amendment of 1903 first provided for publication in a newspaper once a week for two consecutive weeks; also a return day ten days after the publication. A bankrupt or creditor was permitted to appear and plead within five days after the return day instead of ten days as under the original law. Section twenty-one makes it possible to bring the wife of a bankrupt before the judge or referee, provided she be only examined touching business she had transacted for the bankrupt or that to which she had been a party. The twenty-third section related to the jurisdiction of the United States Courts and the State Courts.

Section forty-seven, in reference to the duties of trustees, was

8 Supported, among other cases, by, *Dunbar vs. Dunbar*, 190 U. S. 340.

9 *Tinker vs. Colwell*, 193 U. S. 473.

also revised by the addition of sub-section *c*, which provides that "The trustee shall within thirty days after adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county in which the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which together with the filing fee shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings." The following section re-adjusted the compensation of trustees, receivers, and marshals, then considered insufficient on account of the average diminution of the volume of estates. By the act of 1898 the commission of trustees was three *per centum* of the first \$5,000, two *per centum* of the second \$5,000 and one *per centum* of all amounts in excess of \$10,000. The section in regard to proof of claims was likewise altered in 1903. It formerly read:

"The claims of creditors who have received preference shall not be allowed unless such creditors shall surrender their preferences."

It now reads:

"The claims of creditors who have received preferences voidable under section sixty, subdivision *b*, or to whom conveyances, transfers, assignments, or encumbrances, void or voidable, under section sixty-seven, subdivision *e*, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or encumbrances."

Section sixty-four gave priority for the complete payment of claims, in addition to those previously allowed, for reimbursement for filing fees paid by creditors in involuntary cases, and the reasonable expenses of recovery when the property of the bankrupt, transferred or concealed by him before or after the filing of the petition, shall have been recovered for the benefit of the estate by the efforts or expense of one or more creditors. To section sixty-seven, relative to the declaration and payment of dividends, were added two provisoes, *viz.*, "That the first dividend shall not include more than fifty per cent. of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed; And provided further, That the final dividend shall not be de-

clared within three months after the first dividend shall be declared." Section seventy-two, treating the title to property, was added to as follows: "For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." By the act of 1903 there was added to the law an entire section which directed the clerks of the court to keep accurate records of bankruptcy cases, designated fees, and provided for facility of inspection. Section seventy-two was also amended in 1903, and section seventy-three was added in 1910. These provisions prohibited referees and trustees from accepting extra compensation, in any guise or form, except as allowed by the act, and by the amendment of 1910 this prohibition was extended to receivers and marshals.

The amendments proposed in 1910 were accepted with little difficulty, because the many defects of the law were generally recognized. Section four, clause *b*, was made to include a definition of corporations which were denied the operation of the act as, "A municipal, railroad, insurance or banking corporation." The same clause designated those coming under the provisions of the act as, "Any moneyed, business or commercial corporation." Section twelve was amended so as to inhibit a composition after or before adjudication, but not before examination in an open court and the filing of the schedule and list of creditors. A provision was added to section fourteen, "That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of the creditors called for that purpose." The duties of trustees were further defined, "and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an exemption duly returned unsatisfied."¹⁰

¹⁰ Section 47.

Section forty-eight, subdivisions *d* and *e*, stipulated marshals' and receivers' fees and provided additional fees in case of extra service. Section fifty-eight prescribed rules for notices to creditors, and so modified the existing rules that all creditors were given thirty days notice of all applications for discharge. The next section requires that before dismissal of a petition, a list, under oath, of the creditors must be furnished the Court, and also notice must be sent to all creditors of the pendency of such action, which shall be delayed a reasonable time for response. Section sixty-two, in regard to preferred creditors, was the last to be amended in 1910. Clause *a* now requires that where a preference consists of a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or transfer is required. Clause *b* grants concurrent jurisdiction in a suit to recover property to any court which would have had jurisdiction if bankruptcy had not intervened.

In this connection the amendatory effect of the decisions of the courts throughout the land and the establishment of rules of procedure by the United States Supreme Court¹¹ provided for in the act, must be borne in mind. To advert to them even superficially would require hundreds of pages, but every definition, construction or decision serves in most cases as an extension of the act. In one particular the National Bankruptcy Act has been restricted by a recent act of the Congress which ordains that appeals in bankruptcy, employers' liability and Philippine cases are no longer cognizable in the Supreme Court. This court previously had appellate jurisdiction in bankruptcies cases from the Circuit Court of Appeals if the amount in question exceed \$2,000, and the determination of the question involved the uniform construction of the laws of bankruptcies or some constitutional point of law.

While engaged on the subjects of amendments, it will be pertinent to take up the matter of the proposed repeal or amendment of the present law. Many of its friends realize that its condition is critical, and, while they are aware that the law is incomplete and inadequate in some respects, they fear to agitate

¹¹ Cf. "Appendix d."

any remedial measures lest the foes of the law, by a counter movement, take advantage of the reopening of the question and resulting discussion to bring about a repeal. Such an occurrence is not unusual. An organization, known as the Anti-Bankruptcy Law Association, has been created for the avowed purpose of securing the repeal of the act. In the first session of the Sixty-Fourth Congress five bills were introduced into the House for the repeal of this law. Three were presented on the tenth of December, 1915, one on January 5th, 1916, by Mr. Tribble, of Georgia, and one as late as February 19, 1916, by Mr. Goodwin, of Arkansas. All these measures were referred to the Judiciary Committee, but no report was made before adjournment. There were six House bills pertaining to the Bankruptcy Act (two to repeal and four to amend) introduced at the first session of the Sixty-Fifth Congress which are pending before the second session of that Congress. House bills have been introduced in the second session of the same Congress, as follows: Sims H. R. 6531, on December 3, 1917, to repeal; Dent H. R. 9165, on January 23, 1918, to amend; Dent H. R. 9168, on January 23, 1918, to amend; Brown H. R. 9218, on January 24, 1918, to repeal; Lunn H. R. 11411, on April 12, 1918, to amend. As a result of the propaganda of the Anti-Bankruptcy Law Association further attempts to repeal the act are expected in the next session, but no one anticipates the success of the effort to overthrow this salutary system. Therefore, no attention will be given to their arguments for repeal, but those interested in the matter can learn the cause of their dissatisfaction by referring to the reports of their discussions. The amendment to the law, passed March 2, 1917, has been given on page one hundred and sixty-three.

The majority of the business men of the United States is not dissatisfied with the main features of the existing law and the procedure under it, but on account of present or possible abuses and exigencies not reckoned on, appeals for the revision of certain incidents of the law and branches of its administration. The act is most generally attacked as being weak in respect to four of its salient features; the penal provisions; legal preferences and the definition of insolvency; discharges, and economies and efficiencies. It is also criticised as unduly favoring

creditors. This latter criticism is unjust. The novel principle that insolvency exists only when the liabilities exceed the assets, is alleged to be productive of harm, especially as the law provides for a "fair valuation." Payment is stopped and at the same time proof is made that at a "fair valuation" the assets exceed the liabilities and bankruptcy proceedings are thwarted. Sometimes the rule is used to the disadvantage of the debtor, and his property is sacrificed.

The National Association of Credit Men worked effectively for the passage of the present law in 1898 and for the amendments which have since been adopted. During its National Convention at Pittsburgh in May, 1916, a committee which had been appointed to study the inadequacies of the law, made its report. It will be noticed that it is somewhat colored by antipathy to the lawyers' interests in bankruptcy proceedings as well as the interests of debtors. A conference of four sub-committees of this association was held at New York on May 18, 1916, and in its report to the National Convention, re-affirmed the allegiance of the National Association of Credit Men to the Bankruptcy Act, urged the members to exercise their best efforts to demonstrate the value of it, insisted on the efficacy of the act, expressed its inability to determine the extent of the sentiment for repeal and submitted for the discussion of the convention proposed amendments of the law.¹²

The Commercial Law League of America, composed of more than forty-five hundred members of the bar of whom ninety *per centum* are daily practitioners in the bankruptcy courts, held their annual convention in Atlantic City during July, 1916, and on the twenty-fifth of that month devoted the entire day to a discussion of resolutions offered by both the majority and minority of a committee appointed by the preceding convention. The findings of the committee of the National Association of Credit Men, and the two reports of the committee of the Commercial Law League of America, will be briefly reviewed as best express-

¹² "Daily Trade Record," N. Y., May 19, 1916. For complete report, cf. "The Bulletin of the Commercial Law League of America," July 1916.

ing the matured opinion of the interested people of the country.¹³

The report of the sub-committee of the National Credit Men recommended four amendments to the penal provisions of the act. The first was that section twenty-nine be amended to read:

"A person shall be punished by imprisonment for a period of not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from the officer of the court charged with the control and custody of the property belonging to his estate in bankruptcy, any of the property belonging to the said estate in bankruptcy."

The sub-committee complained that the present act fails to cover concealments of assets before the election of a trustee and also fails to cover concealments by a bankrupt corporation. The Commercial Law League approves the spirit of this recommendation, but objects to the form. It suggests that the clause be extended to include not only the bankrupt, but any person knowingly and fraudulently concealing any of the property of the estate. The minority of the committee concurred with the majority on this point. The next recommendation looks to the abuse of extortion arising under the same section. The suggestion is to amend so as to read:

"A person request, solicit or obtain, or attempt to obtain, any money or property from any person as a consideration for acting or forbearing to act, in bankruptcy proceedings."

This provision is at present considered inadequate to cover a growing abuse in the chaotic condition of bankruptcy. The word "extort" is now limited to its technical meaning. The Law League's committee, both in the majority and minority reports, favors this suggestion.

13 Report of the Committee on Commercial Law of the American Bar Association, June 11, 1915.

"II. Bankruptcy. By the expiration of the 63rd Congress the various pending bills either to repeal or amend the National Bankruptcy Act died. In view of the fact that at every session of Congress bills to repeal the National Bankruptcy Act are introduced, your committee feels that the American Bar Association should pass a resolution renewing its adherence to this statute and authorizing the committee on Commercial Law to oppose any measure that may be introduced in the 64th Congress to repeal the same."

The next recommendation deals with the statute of limitations. A change is desired, so as to read:

"A person shall not be prosecuted for any offense arising under this act unless the indictment is found, or the information filed in court, within three years after the commission of the offense, except where the person is absent from the jurisdiction, in which case the time during which the said person is so absent shall not be a part of the period of limitation prescribed herein."

This dissatisfaction with the existing statute arises from its inability to embrace cases of fugitives from justice, or where the evidence had not been obtained until one year after the commission of the crime. The Law League wholly concurs, and adds the criticism that an anomaly exists in that the act provides for three years' limitation in cases of attempt to conceal, and only one year for actual concealment. Under the English statute of 1883, to expedite prosecution of criminal offenses, the court may order the director of public prosecutions to institute and conduct summary prosecution of violations of the act. In this respect the American code could be remedied. An improvement which would combat a growing abuse arising from the vindictiveness of creditors could also be adopted from the English laws. English petitioners, to prevent malicious prosecutions, are bound in security to make amends in case they do not prove the debtor a bankrupt. If there is collusion to produce bankruptcy, this security, as well as the claims, is forfeited.

The fourth suggestion of the Credit Men met with the most emphatic dissent from the Law League. It would make solicitation by lawyers a crime.

"No attorney of law shall himself solicit, nor employ any runner, solicitor, agent or representative of any kind for the purpose of obtaining or inducing the placing in his hands or in the hands of any firm of which he is a member any claim or proxy in bankruptcy, nor shall such attorney pay any consideration or offer any inducement, directly or indirectly, for the placing of any bankruptcy claim or matter with him or such firm; nor shall he divide any compensation received by him for services in a bankruptcy matter with any one not admitted to the practice of the law.

"A person violating this provision shall be punishable by im-

prisonment not to exceed two years, or fine not to exceed five hundred dollars."

In the remarks and discussions of the Credit Men the scandals committed in bankruptcy cases were likened to those in negligence cases where the alleged employment of lay touts and professional runners contributes to the abuse and defeat of the law. The Law League, as was to have been expected, refuted and rejected this criticism. The discussions are irrelevant. It is sufficient to say that such practice has the universal condemnation of bar associations. In justification of the apparent laxity of ethics, the Law League explains that the law is founded on democratic principles; the creditors, those who are most interested in proper administration, are given the suffrage and it is their ballots which decide each important step. The success of any democratic scheme must invite and demand the active coöperation of those whom it is intended to benefit. In accepting the claim of a creditor, the lawyer becomes the agent of the creditor, and, if to protect the interest of all creditors, including his client, it becomes necessary to ask the help of other creditors, the lawyer has the legal and moral right to extend the invitation, just as the client might do. To say that the alert attorney, representing a non-resident, after discovering circumstances which convince him that bankruptcy is the only means to save the assets, must sit with folded arms, awaiting the arrival of two more claims from where he knows not, is an absurdity. It is not reasonable that he, knowing that there are two more claims which he could get for the asking, must telegraph his distant client to get the other creditors. While he is thus paying ceremonious devotion to ethics, perhaps, the assets are being removed by a rascal who has obtained the goods on misplaced credit.

The following suggested amendment treats the acts of bankruptcy and defines insolvency. It would add to section sixty, as the sixth act of bankruptcy, "suffered or permitted." The same phrase should be added to the seventh act. Revision of section one, sub-section fifteen is urged, so as to read:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of all property exempt from execution, unless such exemption be permanently waived as to

all then existing creditors, and also exclusive of any property which he may have conveyed, transferred, concealed, or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

To this proposal the Law League did not object. Such an amendment would adjust some of the difficulty arising from conflicting State exemption laws.

The subject of discharges was next taken up. In regard to concealment of books and property, and false statements, as a bar to discharge under section fourteen, it is proposed to put the burden of proof of innocence on the bankrupt. The Law League considers this amendment of the ordinary rules of evidence too radical and too unfair. If passed, it is reasonably certain that this plea would be made in bar of discharge by one interested party or another in almost every case, regardless of whether or not there were grounds for it. The alteration is modified by a provision that where the statement has been proved to be false the burden shall rest on the bankrupt to show that it was not knowingly or materially false. The Law League adopts the suggestion making it incumbent on the bankrupt to establish his innocence of an act to transfer, remove or destroy his property, or permit the same to be done within four months preceding the filing of the petition with intent to defraud or hinder his creditors, if proved by an interested party.

Three suggestions are made by the sub-committee on economies and efficiencies. The first seeks to readjust the compensation of referees, receivers and trustees. Under the prevailing system the compensation of all officers of the court, except the Judge, is derived from the liquidated estate by the commission method, and the amount depends on the value of the estate. The suggestion is made that a fee of \$15 be deposited with the clerk at the filing of the petition, and this with \$25 for every proof of claim filed for allowance, is to be utilized for the costs of administration, and a further charge is to be made for estates which are administered with less than usual process of one *per centum* commission on all monies disbursed to creditors by the trustee, or turned over to any person, including lien-holders; or one-half of one *per centum* of the amount paid creditors upon

the confirmation of a composition. It is suggested to add to "of a composition," "not to exceed the same rates which would have been allowed to him had the estate been administered in bankruptcy." This re-adjustment would equalize the compensation of referees, trustees and marshals in cases of composition, which, due to an incongruity in the amendment of 1910, allowing extra compensation to receivers and marshals, did not mention referees and trustees.

The fairness of this proposal is manifest. There is really little difference in the amount of attention exacted in compositions and the regular bankruptcy administration. Due to the compromising spirit of a composition, very often the work is more difficult. By adopting this amendment there will be no need of subterfuge or excuse for giving receivers and trustees extra allowances.¹⁴ This recommendation is a step in the right direction. In the English system there is a fund from which the expenses of administration are paid, made up of the fees charged the bankrupt estates, interest on the balances of estates and unclaimed funds. This institution is criticised as being unfair, for the act professes to be based on the principle of enforcing commercial morality in the interest of the community, and the cost of this advantage to the community should not be inflicted on the bankrupt estates alone. Some argue against raising the fees that, even if they are disproportionate in composition cases to the amount of attention demanded, the officials appointed by the court are in most cases designated upon solicitation, and are not compelled to serve if they feel that the compensation is insufficient. Of course, the compensation should attract competent and responsible men, but at present the best lawyers and business men of the different localities are eager for the appointments.

Another recommendation made by the Credit Men follows a principle of the English system. In that country the receiver continues in charge of the estate and its administration unless three fourths in value of the claims and the majority in number of the creditors desire to elect a trustee. Here it is requested to combine the office of receiver and trustee so that the receiver

14 Report of the Committee of National Credit Men of America.

would automatically continue as trustee after adjudication unless dislodged by an adverse vote of the creditors. To this proposal the American Bar Association, the National Association of Credit Men and the Commercial Law League are opposed. The bankruptcy law did not contemplate receivers as administrative officers, but as temporary custodians of the estate in the interim of the filing of the petition and the election of a trustee by the creditors. Such an amendment would be at variance with the fundamental business and democratic principles of the law. It would also operate to turn the administration of bankrupt estates almost completely over to the courts. The practice would tend more and more in that direction and in a proportionate degree away from the control of the creditors. A further suggestion of the economies committee, which meets hearty approval, is the improvement of section forty, by reducing the allowance of the referee for taking testimony from ninety to thirty cents per folio.

The eighth proposition meets with partial approval. The Law League does not consider that a distinction should be made in the different acts of bankruptcy as to the time when an adjudication is to be entered. Therefore it disapproves the proviso, "except when an assignment for the benefit of the creditors or a receivership, cognizable under section three (a) and four of the bankruptcy act is the act of bankruptcy set forth in the petition, then it shall be returnable in two days and in all other cases..."¹⁵ The object of the proposers of this alteration is not to afford time for the assignee for the benefit of the creditors to do much harm to the assets.

The final recommendation looks to the amendment of the general orders of the Supreme Court made by virtue of the act. The first objection is to the power granted the courts to appoint special masters, generally the referees with extra compensation, thus adding to the expense of administration. The contention is made that the court should refer matters to the referee either before or after adjudication, or should dispense with any reference and hear the case itself. If it is submitted to the referee at all, it should be submitted to him in his capacity as referee

15 "Bulletin," Commercial Law League of America, June 1916, 390.

and not as special master. In other words, this is one of the duties of the referee, and for contingencies of this kind a special master is not needed. The Commercial Law League approves of this change. This difficulty of double administration is viewed in different ways. One authority says that there is only one way to obviate it, "and this would be by abandoning the democratic idea of electing trustees by the votes of the creditors and by throwing the appointment of receivers into the hands of the court, with a veto power perhaps on the part of the creditors if an unsatisfactory receiver were appointed, resulting simply in another appointment by the court." It is stated, also, "the double administration, first through a receivership, and then through a trusteeship, now happily become not infrequently, a triple administration, with assignee first, receiver second and trustee third, is the crying evil of the Bankruptcy Act."¹⁶ The next recommendation, in regard to attorneys' affidavits on compositions, is considered by the Law League as nothing more than an unwarranted reflection on the legal profession. It would provide that the court require each attorney receiving an allowance out of a composition or settlement of a bankruptcy proceeding, as well as any attorney waiving such allowance, to make affidavit to the amount of his fee, and oath that he has not received, directly or indirectly, and has made no arrangement for receiving for himself, his firm or his client, any other or further compensation or bonus from any person by virtue of the composition or settlement. The allowance of fees out of the estate for attorneys who successfully oppose a composition might result in unfairness to the majority interests. It would invite "strikers" and small interests to take advantage of the opportunity to obtain fees. "What the majority wants is generally right and the minority should not be encouraged to use the funds of the estate for the purpose of defeating the wishes of the majority."

The proposed improvements in respect to creditors' receipts for payments made in a composition or for dividends paid out of the estate are superfluous legislation in an age pregnant with

¹⁶ Remington. "Trade Record." June 12, 1916.

this evil.¹⁷ The plan is to have creditors sign a receipt that they have not received or arranged to receive from the bankrupt or any other person, any other consideration than that receipted for. It is claimed that contrary to the equitable distribution of the law, there are few adjustments in which some creditor does not receive a greater dividend than that to which he is entitled, either through excessive attorneys' fees, or as a reward by some relative or friend of the unfortunate one for what is generally termed "appreciated service" in urging the acceptance of an inadequate or improper adjustment. The report also asserts that these practices are often covered up by alleged "waivers" of fees. The lawyers reply that "the sub-committee has fallen into the common fallacy of believing that dishonest men can be made honest by legislative enactment." A lawyer or creditor is enjoined by these acts not to do what is already illegal. It betrays ignorance of human nature, for, "the conscience of a man who knowingly violates the law for gain will permit him to take the oath necessary to retain the fruits of his turpitude."¹⁸ A recommendation which requires referees to keep and submit to the District Court during January of each year an itemized account of actual expenses is approved by the Law League. Surpluses after the payment of expenses are to be paid into the courts to be used for deficiencies when they occur. The motive for the provision is that the act intends that referees be paid the necessary expenses in addition to legal compensation, and it is exceedingly difficult to keep accurate account of the proportional expenses for clerk hire, stationery, telephone, etc., in an office where there are different estates in different stages of administration. It is admitted that abuses have grown up with regard to the expense money, but an amendment along the suggested lines seems to be inexpedient. In most jurisdictions a single bankruptcy case is rare and more than one at the same time never occurs.

17 In the past five years the United States Congress and the legislatures of the States have produced 62,017 specific laws. "Corpus Juris Calendar," July 1918. The remedy used by the Romans should be revived. "A Lorician who proposed any new law stood forth in the assembly of the people with a cord around his neck, and if the law was rejected, the innovator was instantly strangled." Gibbon, "Decline and Fall of the Roman Empire," Mathuen's edition, 447.

18 "Bulletin," July 1916, 392.

The last amendment proposed by the Credit Men is energetically opposed by the lawyers, because it strikes at their integrity. It provides that precedent to the payment of an attorney's allowance out of the estate for employment, such employment shall have been duly authorized by the court upon demonstration of its necessity, "and no fee whatsoever shall be allowed out of the estate to the attorney for the petitioning creditors, bankrupt, receiver, trustee or any other person unless the same be fully itemized and the value of such items set forth in detail." The rebuttal is long and not pertinent, and of all which are proposed this recommendation is undoubtedly the weakest and least likely to become a Federal enactment.

In obtaining needed improvements in the general orders of the Supreme Court the opinions of the lawyers of this country will have great influence. There is a great bond of sympathy between them and the supreme tribunal. Outside critics, however, although not always equipped with the highest technical knowledge, can sometimes supply practical suggestions. Some adaptation of the practice of the English Board of Trade might be utilized to render the rules of procedure and general court orders more acceptable. In England these orders are made by the Lord Chancellor with the advice and concurrence of the Board of Trade. This plan would afford the commercial interests an opportunity of having their needs and proposals promptly considered, and it would promote a closer communication with the makers and the interpreters of the law. It would also obviate years of discussion in conventions, and interviews for the purpose of soliciting the influence of the legislators. Such matters as the justice of jury trial in regard to the facts of the case if requested by the creditors, would thus be speedily settled.¹⁹

There is another element in the country which is satisfied with the existing system and opposes any change. Writing on this subject Remington says: "The fact is that the statute is well nigh perfect—that is to say, as perfect as any piece of legislation can be said to be. Those who carp at the statute usually have some special case which they would like to have it decide for them in advance.

19 Cf. *Elliot vs. Toeppner*, 187 U. S. 327.

"The act is framed on broad statesmanlike lines and is the result of a generation of careful thought as to the best way to take care of business failures. It would be a calamity to the credit system of the United States to have this national law displaced by the 49 differing and confusing systems of State jurisprudence.

"Beware of the talker who says the Bankruptcy Act is full of holes. He is talking and not thinking. Set him to work and you will see the sorry job he will make of the amendments he would propose. There is one amendment only that no man would oppose—an amendment that would create dividends where there were no assets.

"The mere matter of lengthening the Statute of Limitations from one year to three years and the extension of the penal provision against concealments is not so important as to warrant any action at the present time. Indeed, one of the proposed amendments to the criminal section—the one which prohibits the solicitation of claims is radically wrong. It places local matters directly in the hands of local collection agencies which control without need of employing solicitors and solicitation, the bankruptcies of a particular neighborhood, and which work together to put through wicked and collusive compositions and schemes, each crowd aiding the other in the ring."²⁰ In regard to this amendment the Merchants' Protective Association is of the opinion that, "it will endanger the proper scope of creditor receivers or trustees endeavoring by negotiations and adjustment to recover the property claimed by them to be a portion of the estate of the bankrupt. Creditors' committees refunding compositions and demanding larger compositions than those first offered by bankrupts are subject to the risk of being charged with the violation of the proposed amendment, and we deprecate any amendment to the act which may deter creditors, receivers or trustees from exerting freely every effort to recover by negotiations, property which they claim as a portion of the bankrupt estate."²¹

One authority sees in uniform court rules a solution of the

²⁰ "Daily Trade Record," N. Y., June 12, 1916.

²¹ Letter of Henry P. McKenney, President Merchants' Protective Association, in "Daily Trade Record," June 8, 1916.

problem. "The great trouble to-day is with the practice in bankruptcy. Indeed, the opposition of Congressmen will be found to rest not on any fault found with the statute itself, but on the fact that rings control the bankruptcy administration and bankruptcy affairs in so many localities—rings which exercise their power with the same evil effect as do the political rings in the field of politics.

.....
 "The proposed change in court rules could be brought about by quiet action in each of the different districts or even by application to the Supreme Court of the United States itself, without in the least degree disturbing the country at large with an amendment of the act itself.

.....
 "Only in a few cases can the statute itself be amended with advantage and those cases are of such comparative unimportance that it would be unwise to start in to do it at this critical juncture."²²

In this connection some advantage might be gained by attention to successful features of the bankruptcy systems of other countries. By the code of Germany of 1877, careless book-keeping is severely punished as a criminal offense. This, like gambling, dealing in futures and extravagant living are considered culpable in the bankrupt, and whether or not they are done ignorantly or intentionally is carefully investigated.

England does not consider careless book-keeping a species of fraud unless it is done designedly, contributes effectively to the insolvency or the deficit of the estate amounts to more than two hundred pounds.

In France, bankruptcy is considered *simple* or *frauduleuse*. The procedure is regulated by the Commercial Code of 1807, supplemented by the law of the ninth of June, 1838, and embraces only the trader who is unable to meet his obligations. He need not be insolvent, but only suspend payments as they come due. The debt must also be a commercial one, the law being designed exclusively for the benefit of commerce. Jurisdiction is in the Court of Tribunal of Commerce upon petition by the debtor, his

creditors or *proprio motu* of the court. A *Syndic Provoisair*e is appointed with duties analogous to those of the American referee and trustee, and a *Juge Commissaire* to supervise the *Syndic*. Process terminates with a *composition*, *concordat* or the sale and distribution of the assets. A feature highly creditable and almost peculiar to French commercial integrity leaves the unpaid balance a debt *d'honneur*. The bankrupt, until he shall have discharged his obligations in full, is not rehabilitated, has no political rights, can not hold public office, serve on a jury or act as a stock broker.²³ In England, too, bankruptcy disqualifies for election to the House of Commons or summons to the House of Lords.²⁴ Fraudulent failure, as in Germany, is punishable by penal servitude for five to twenty years. In the latter country there is great rapidity of liquidation by sale of the assets at auction, and the fees are moderate, in the ordinary case not exceeding a hundred marks.²⁵

23 "Aucun banqueroutier, failli ou debiteur insolvable, ne pourra etre admis dans les assemblees primaires, ni devenir ou rester membre, soit de l'assemblee nationale, soit des assemblees administratives soit des municipales. C. 5, fruct. an. III, art. 13; C. 22, frim. an, VIII, art. 5—Instr. 8, mars, 1848, art 4. Fripiet, p. 2.

In England and Ireland social ostracism is general and extends even to the family of the bankrupt.

24 Anson, "Law and Custom of the Constitution," London, 1897, 84, 211.

25 For further reading, cf. Dunscombe, "A Comparative Study of Bankruptcy, Political Science Quarterly," vol. III.

CHAPTER XI.

SOME ASPECTS OF BANKRUPTCY RELIEF MEASURES.

LEGAL, MORAL AND SOCIAL-ECONOMIC.¹

Higher civilization demands for the individual civil liberty and equal opportunity; society needs the untrammelled effort of every honest man. A practical system for the relief of bankrupts, because of the conflicting character of the ends to be accomplished, must inevitably complicate the task of the State. Such system should be an harmonious combination of the maxims of the law, the rules of ethics and the principles of social-economics. It should be the result of the legal rights between man and man as tempered by Christian principles and the prerogative of society to receive the benefits of the labor of every member. The laws of bankruptcy are not designed solely for the interest of the debtor or of the creditor or indeed for their combined interest. The claim of justice and the commercial development of the nation also must be considered.

Traces of the commercial origin of the legislation on bankruptcy are to be found in all stages of its development. Disregard of agricultural and industrial interests and their obvious economic value in the formation of statutes on bankruptcies has been traditional. On the other hand, every farmer and member of the guilds had inherent and traditional antagonism to anything favoring the trader. This dates back to the early years of Henry VIII, when for the first time the commerce of the English people assumed an important and definite form. It was then that there arose a class of middlemen whose activities were antagonistic to the interest of the tillers of the soil. This difference and competition had been perpetuated, and any legislation which the one class had accomplished for its benefit had carefully excluded the other. Blackstone's description of this condition has been given.² Remington thus briefly sketches the

¹ These are aspects which legislators have had throughout all history in enacting bankruptcy laws.

² *Supra*. c. II.

story of the origin of this legislation, which he attributes to the credit system:

"When modern business methods first began, when men first began to manufacture quantities of goods for the open market in reliance upon a future demand that might or might not arise; when they first began to entrust these goods to others whom we would call nowadays 'retailers' by way of sales upon credit, for more detailed distribution among consumers in different parts of the country, there arose the necessity for some comprehensive system of jurisprudence that would rightly and efficiently take care of the rights of the parties in event that this credit was found to be misplaced. The old common law methods were insufficient, because they did not take into account the situation thus arising when one person has in his possession a stock of goods purchased from a great many others on credit, all of whom are interested in the insolvent fund in proportion to their respective claims."³

Under the strict operation of the common law, when a debtor was unable to meet his obligations as they fell due, the creditors in turn instituted attachment proceedings according to the priority of their claims or their alertness in detecting the condition of the debtor. In many cases, liquidation was forced, when if the creditors had possessed no advantage over one another through individual knowledge, and had practised patience, after a brief suspension payments would have been resumed and failure averted. The new principle recognizes the common rights of all the creditors in the assets, and institutes a varied remedy designed for their benefit as well as that of the community. Thus "arose bankruptcy laws whose functions are primarily the protection of the insolvent fund from unfair or fraudulent depletion and its right administration and distribution among the creditors."⁴

Subsequent events have justified this departure from the rigid forms of the common law. "One of the first duties of legislation, while it provides amply for the sacred obligation of contracts, and the remedies to enforce them, certainly is, *pari passu*,

3 "Insolvency and the Bankruptcy Law," N. Y. 1912, 2.

4 "Insolvency and the Bankruptcy Law, 2.

to relieve the unfortunate and meritorious debtor from a slavery of mind and body, which cuts him off from a fair enjoyment of the common benefits of society, and robs his family of the fruits of his labor and the benefits of his paternal superintendence."⁵ The fundamental purpose of government is to obtain a greater degree of protection for natural rights, and additional privileges which otherwise would not be obtainable. The State must, therefore, provide some remedy, and it should be commensurate with all the conditions of the specific case. Legislators in general have not regarded the fundamental principles of political economy in the framing of the laws of bankruptcies, but it is important that these principles should receive consideration. Insofar as these laws have been the response to the policies of the commercial class of the community, it is just to state that these principles have received more than due attention. The most causal study of the subject will disclose the fact that every system of bankruptcy has been the product of commercial necessity and development. It has the appearance of a gradual growth, tentative in character, and subject to oscillations according as the debtor or the creditor class predominated. For an understanding of the principles underlying all bankruptcy legislation, a knowledge of this fact is indispensable. Close scrutiny will show, however, that the fundamental object of the authors of these measures has been, for the most part, to obtain the best method of getting the highest dividends out of the assets.

For the establishment and maintenance of credit there should be some guarantee that credit, when extended, will not be violated. Sir Walter Raleigh long ago published this proposition: "The wealth of a country is founded on its commerce, and the commerce of the world is the wealth of the world."⁶ From the earliest days of civilization the value of credit as an auxiliary to wealth has been realized. Demosthenes said that if one were ignorant of the fact that credit is the greatest capital of all towards the acquisition of wealth, he would be utterly ignorant. Daniel Webster testifies to its utility when he says: "Credit has done more, a thousand times, to enrich nations than all the

⁵ Story, "Commentaries," II, 48 et seq.

⁶ "History of the World."

mines in the world." A contemporary authority states that, "Our wonderful civilization itself has been rendered possible by the credit system and is built on that system."⁷ Imprisonment as a means of enforcing the fulfillment of contracts, and thereby supporting credit, is uneconomic, since it strikes at the root of all personal effort on the part of the debtor to retrieve his position and to return to solvency. Hence, there is need for a system which while maintaining credit, is just to creditors, is not unduly burdensome to debtors, and which discriminates between the involuntary inability of the honest business man and the wilful or fraudulent neglect of the adroit rogue or abandoned profligate. Insolvency is forever a concomitant of the credit system. Therefore, in a contingency when full payment of a debt is impossible, the partial payment plan of the modern bankruptcy system is the best remedy. That its practical results fall short of its theoretical promise as a means of carrying out a contract, of supporting the credit system and indirectly contributing to the commercial success of the country is principally because its efficiency is not realized and appreciated as it should be by law-givers, business men or the people in general.

Such law should support credit in two ways, by placing limitations on the one receiving it and by providing an opportunity whereby the insolvent debtor may declare his true condition without the former disastrous consequences. Thus the resources of the creditors will be conserved. The sooner the condition of insolvency is published the better it is for all parties concerned, but the natural tendency of the hopelessly disabled debtor is to persist until the last chance of survival has vanished. This tendency can be likened to contact with a "live wire." The failing business man can not let go, but holds on until too late he realizes that to surmount his difficulties is impossible. Then he has recourse to the bankruptcy law, the switch which releases him. Without this salutary remedy, the condition in the case of the conscientious man would not be relieved until he had worried himself into a grave. Under the ancient law, he that died paid all debts. If he were dishonest, the condition would continue

7 Remington, "Insolvency and the Bankruptcy Law."

until all the funds were depleted, and then the creditors would get nothing. In contracting the debt the creditor is protected by this law, for he knows that if his debtor meets with reverses, and failure becomes imminent, dependence can be placed upon the provisions of the law to give him restitution. The debtor, too, calculates that in the event of failure he can be relieved from his encumbrances. With this understanding the debtor and creditor bargain in regard to the extent of the credit.

The effect of failure on the creditor must also be taken into consideration. The accounts receivable are a part of his assets and loss of them may cause his embarrassment. This explains the wrath, vindictiveness and tenacity of creditors, for often recovery from the bankrupt is necessary to save them from a similar plight. It is also to the interest of the credit-givers of the country to encourage and hold up the hands of the debtors, for their relief and prosperity is indispensable to that of the creditors. To regulate these business affairs a bankruptcy law is much needed in the United States. Commercial and monetary institutions are young, conditions are unsettled and trade fluctuations are more frequent, unforeseen and violent than in the Old World, where conditions are more static and changes of trade are less common and less embarrassing. The migratory habit of the citizens of the United States, both as to occupation and location, complicates the situation. Few Americans live an unbroken career.

The limitations on credit are accomplished mainly by the discharge feature of the law. The abuse of the credit and confidence reposed in the one receiving it is a bar to his obtaining the grace of a discharge. It is true, a bankrupt and a usurer do not disagree. The tendency of the failing debtor is to grasp in every direction to save his business. The payment of usurious rates of interest is only one of his usual shifts. Bankruptcy legislation is, perhaps, the only remedy for the evils arising through the reckless abuse of credit and the unnatural trade competition thereby engendered. More than twenty-two thousand of the business failures of the United States in 1915 are attributed by the Federal Trade Commission to careless, haphazard business

conduct.⁸ Particularly in contrast to the English system, the discharge feature of the American system is recognized as highly valuable. In England the application for discharge is not obligatory; it is rather difficult to obtain and when acquired is not advantageous unless all obligations have been satisfied. Hence, in that country there are about seventy-five thousand undischarged bankrupts constituting a menace to the trading community. The same situation would exist in the United States in the absence of a relief law which provides for the discharge of the bankrupt as well as for his rehabilitation. Subterfuges would be used, businesses would be continued under the names of relatives, and there would be no one responsible for the violation of credit. In our country every insolvent is eager for this discharge, and the number of undischarged bankrupts does not exceed five *per centum* of all those who pass through the proceedings. Another injurious practice is destroyed by this feature. It is that of relying on the sympathy of third parties to relieve the distress of the unfortunate. This is a false and vicious practice which had often been used to induce imprudent persons to incur debts but which is now wholly discarded. Among other unreasonable remedies based on the inconvenience and suffering of the debtor's person or family, this practice is inconsistent with later civilization.

The reliver of the debtor and his commercial restoration are important studies in the field of social-economics. The abolition of imprisonment did not remove from the debtors all restraint and bondage. Without the *tabula rasa* of the system of bank-

8 "... the number of small manufacturers who have no adequate cost-accounting system and price their goods arbitrarily is amazing.... Out of sixty-five thousand concerns doing a business of a hundred thousand a year and upward, which have made reports to the commission thirty thousand charged off nothing for depreciation. This involves a great deal of essentially unfair competition. The manufacturer or merchant who sells goods at a loss, or no adequate profit, because he does not keep books properly and does not know whether he is making a profit or not, tends to force his competitors into a like situation. True, consumers may for a time get goods that much cheaper; but we do not believe there is any ultimate gain to anybody.

A man who does not keep books properly, so that he really knows how his business stands and whether or not he is actually making a profit, is not entitled to credit and should not get it. Credit should always be based on an intelligible and accurate balance sheet." "Saturday Evening Post," March 4, 1916.

ruptcy laws, earning capacity is taken away, the faculty of usefulness and aptitude is paralyzed and hope is extinguished. "Society can never prosper but must always be bankrupt, until every man does that which he was created to do."⁹ Franklin appositely describes the debtor's state of mind.

"If you cannot pay at the time, you will be ashamed to see your creditor; you will be in fear when you speak to him; you will make poor pitiful sneaking excuses, and by degrees come to lose your veracity, and sink into base, downright lying; for, as Poor Richard says, *The second vice is lying, the first is running into debt*; and again, to the same purpose, *Lying rides upon debt's back*; whereas a freeborn Englishman ought not to be ashamed or afraid to see or speak to any man living. But poverty often deprives a man of all spirit and virtue. *Tis hard for an empty bag to stand upright!*"¹⁰

This mental condition of a member of society brings to it no benefit. On the contrary, society must be seriously injured by the presence of unproductive or discontented members, who through idleness or vicious habits may eventually become public charges. If the laws of bankruptcies were based on the legal rights of individuals, there would be no warrant for the discharge of debtors from the payment of their debts as long as they lived, or their estates would continue to exist. But public policy makes it expedient that insolvent debtors, instead of being forever entangled by obligations as enduring as the task of Sisypheus, shall be given a fresh start in life under the benevolent influence of the ordinary incentives to industry and enterprise. The exhilarating effect of release from the onus of debt is thus described by Shakespeare:

And when the mind is quicken'd out of doubt,
The organs, though defunct and dead before,
Break up their drowsy grave, and newly move
With casted slough, and fresh legerity.¹¹

On the other hand, this benign policy must not be permitted to

9 Emerson, "Conduct of Life," Riverside edition, 110.

10 Franklin, "Poor Richard's Almanac."

11 "Henry V," IV, 1.

foster greater evils than unrelieved insolvency produces. The mode of relief should be elastic and graduated according to the comparative merits of the conduct of the debtors and the circumstances which led to their insolvency. When obligations can be satisfied more easily than through toil and sacrifice, far less effort to make honest payments is likely.

The three fundamental aims of every modern bankruptcy system, the distribution of the assets, the relief of the debtor and the prevention of fraud, are largely social-economic. The welfare of the creditors *in parte* and of the whole credit system are taken care of in the equitable distribution of the assets. In this connection can be noticed the cardinal principle of bankruptcy legislation which required a departure from common law practice. Ordinarily while solvent, a man may pay whomsoever he pleases; likewise, any creditor whose claim is overdue may seize and hold to satisfy his claim by legal process whatever property of the debtor he can find. When the debtor becomes insolvent this privilege ceases. The debtor is no longer permitted to pay whom and as he pleases, and the first creditor who happens to learn of the condition can not levy up to his full claim, then the second in like manner, and so on until all the funds are exhausted, for, perhaps, still other creditors would obtain nothing. It was in recent times that legislators sufficiently recognized that in paying debts and making levies according to the common law, the debtor does not use his own property to pay his debts, nor do the creditors who levy attach the property of the debtor, for he has depleted his own property, and that is the precise reason for his insolvency. If he were permitted to continue payments, he might pay some favored creditors with the funds contributed to him by all his creditors. What remains is not the debtor's property, but, perhaps, only a portion of what really belongs to all of the creditors in common, and from which if all can not receive full satisfaction, it is only equitable that distribution should be *pro rata*. Equity could not be extended to cover the situation, for it too recognizes priority.¹² As soon as insolvency is confessed or detected, therefore, the bankruptcy law sets aside the

12 A so-called "Creditors' Bill" in equity allowed the creditors to convene and amicably adjust affairs, but although a step in advance of the common law, it was not a summary procedure.

residue as a trust fund belonging to all the creditors, and commences to operate for the liquidation and distribution of it for the benefit of all.¹³

Since the common law afforded no relief, and the laws of equity were too restricted to encompass these difficulties, action *in rem* was devised. The claims of all the creditors were reduced to one cause directed in a single tribunal, not against the person of the debtor, but against his estate, his *res*.¹⁴ The United States District Courts are considered the same court in different places, and an adjudication in one branch of the court draws in and affects all persons cognizable in any branch. An action in bankruptcy is considered by many authorities not strictly *in rem*, but *quasi-in rem*. Some of its applications are still *in personam*. They affect the person of the debtor, and also the creditors by eliminating their personal rights to full payment. Among other innovations the transfer of property upsets the ordinary procedure, or at least alters it. The usual transfer is not used, but the right and title in the property are vested by a judicial act without the concurrent acts of either of the parties. Previously, by the operation of the law, it was vested in the assignee. Under the new form of procedure claims and preferences are investigated, are allowed or disallowed, the property is liquidated and the fund distributed. The conflicting claims of creditors prevent their acting as a homogeneous body and hence the need of administrative or quasi-judicial officers. This gives rise to professional interests in the assets, not cognizable by the common law.

Relief from incumbrance constitutes the chief benefit of the system for the debtor, while the third aim, the punishment of fraud, prevents any attempt against the sanctity of the credit system. The provision for a discharge is generally considered the key to the efficiency of the system and through it, as a control valve, the courts are able to bring moral censorship to bear on

13 This fund idea was known to the Scotch as early as 1621. By an act of the Scottish Parliament of that year, Jac. I, c. 18, it was ordained that, "no debtor after insolvency shall diminish the fund belonging to his creditors."

14 For the origin of action *in rem*, cf. Pollock & Maitland, "History of the English Law," etc., II, 173, 203.

the conduct of all debtors, and by this method a high standard of commercial integrity is encouraged and maintained. Preferences, collusions and the sequestration of the assets constitute an impediment to the securing of the coveted release, and if the attempt is made it is rendered futile and punished by the law. In addition to prompting discontinuance in season by magnanimous relief, this legislation also discourages over-trading, since no preference can be given to friends, capitalists or usurers.¹⁵

This excellent system of laws brings honor to our credit system abroad. Foreign merchants are confident that the American credit is safe, and that in the ordinary failure their share of the dividends will be just, certain and equal as if they were living in the same city as the debtor. The beneficent effects of a bankruptcy law on the business of a country is generally conceded. With us it has diminished the number and severity of failures, it has established and extended the credit system, it has afforded additional advantages for the good order of society, and finally, in a great degree, it has contributed to the solidarity of the commercial edifice.

The common welfare is the foundation and object of the doctrines of bankruptcy relief derived in *foro interno*, or conscience, as well as in *foro externo*, or the courts. The bankrupt occupies a peculiar and debatable position in the eyes of legists and moralists. A fraudulent bankrupt is not to be considered as entering into this discussion, since he deserves no indulgence from society, but should be exposed to criminal prosecution and imprisonment. This treatment concerns only those who fail to pay their debts, not those who fail to avoid paying them. On the other hand, to release a debtor from encumbrances or even from prison is no impairment of a contract. The justice of repudiation of claims will be developed later; but imprisonment is not an express or implied condition and release is simply a suspen-

¹⁵ The bankruptcy law "acts as a preventative and check to overtrading, by largely preventing the giving of preferences by the insolvent." Brandenburg, "On Bankruptcy," 4. Cf. Cadwalader, J., in re Woods, 7 N. B. R. 126.

sion of a legal sanction for the violation of the terms of the contract.¹⁶

In the absence of fraud or criminal negligence, the bankrupt although not guilty, is not wholly innocent, for the creditor has rights which must not be violated even if adversity be the cause of the bankrupt's condition. His claims are a part of his property, but his rights are partially offset by the paramount rights of the community. A private right must always give place to a general good. But this law also operates for the creditor's advantage, for if the insolvent debtor remain under the burden of debt, the fund will gradually be further diminished, perhaps depleted, while the creditor will procure nothing more except in the case of the conscientious man who, in any event, would make restitution. By relieving the debtor, the community is benefited by his experience, greater precaution and renewed industry. In spite of his misfortune a debtor continues to enjoy rights co-equal with the creditor. Therefore the State is called upon to administer, differentiate and protect the rights of the debtor and those of the creditor.¹⁷

God wills human society, but civil society can not be maintained without authority to protect and enforce the definite individual rights of those composing it in a manner conformable with the best interest of society at large. To do this is the first duty of the State. Its second duty is to determine and maintain indefinite rights. To accomplish these purposes the State has the right, by the natural law, to pass any positive law which really favors the common good by the protection of some private

16 "Imprisonment, as a civil remedy admits of no defense, except as it is used to coerce fraudulent debtors to yield up their property to their creditors, in discharge of their engagements. If there is no property, or after yielding it up, to imprison them is a refinement of cruelty, and an indulgence of passions, which could hardly find apology in an enlightened despotism; and are utterly at war with all rights and duties of free governments." Story, "Commentaries," II, 48.

17 Legal recognition of this doctrine, which equity loves, is thus summarized from *in re Witkowski*, 10 N. B. R. 209:

"The purpose of a bankruptcy law is to place within the possession of a creditor that to which he may be entitled within the shortest possible time, and at the same time if the bankrupt has made a fair and honest surrender and complied with the requisites made of him, to give him a speedy release and let him begin again to provide an honest living for himself and those dependent upon him and again become a useful and active member of society."

right. The norm of interference with private rights is the public good. The relation of the debtor and the creditor is a relation of contract entered into with the fullest intention of the parties thereto to accomplish that which they promise. Is the authority of the State competent to interfere with the relation of contract, and if it is, to what extent can it absolve a debtor from his debts? According to what theologians call "natural justice," the debtor owes the full amount which represents that which he has received, and he is obliged, *coram Deo*, to pay it. If he is unable to pay in full, assuming the equal circumstances of all the creditors, he should pay *pro rata* as much as he is physically able to spare. If afterwards he prosper and is in a position to pay the balance, he must do so. In this rule, in the absence of the general good, all the doctors agree. It is understood that in case the bankrupt does not become able to discharge the debt, he is not culpable, unless he assumed it knowing that he could not fulfill the obligation. Physical or moral incapacity will be a valid excuse as long as it lasts, for if he can not make restitution without reducing himself to beggary and those depending upon him to wretched circumstances, it will be sufficient if he have the desire to restore what belongs to his creditors.

For the common good, however, the State has authority to interpose and to set aside the rules of "natural justice." By virtue of this power bankruptcy laws have been established, which relieve the debtor who has complied with all the legal requirements and protect him against the courts and invocation of authority for the exaction of additional payments.¹⁸

18 "It may be safely held that the civil power has authority under certain circumstances to enact such a law as would release the debtor from the obligation of full payment, while that obligation might have remained if the law did not exist." Slater, "Manual of Moral Theology," with American notes by Martin, I, 440.

"If the legislative body of any nation confining itself to matters subject to its jurisdiction enact a measure whose effect will be to promote the public good, there is no sufficient reason to deny it such authority. . . . There can scarcely be a doubt that the civil authority can release a bankrupt from all future liability if it choose to do so. Especially in trading communities it may be for the public good that an honest but unfortunate trader should be able to begin again, without being weighted with a heavy load of past debts. If the law releases a bankrupt debtor from all future liability, the rate of interest will soon accommodate itself to the circumstances." Ibid. p. 438.

In arguing states' rights, Calhoun held the contrary view:

"If by discharging the debt be meant releasing the obligation of the con-

Is this law just? Moral theologians agree that it is, for it promotes the common welfare. Considered in the specific case it has the appearance of a discrimination in favor of the debtor by removing a disability which would impede him throughout life. Also it is a hardship on the creditor by depriving him of his claims. Such consideration is not thorough. Our government chooses from the population a certain number of young men and gives them the advantage of training and education at the Military Academy at West Point and the Naval Academy at Annapolis. What is the object sought? It is not the improvement of the individual *in se*. The greater good which these young men will be fitted to accomplish for the nation is the purpose of these institutions. The State is permanent and takes measures for its protection. Upon the same theory lepers are isolated, tuberculosis sanatoriums are established, and the care and education of orphans are made duties of the State. In order to accomplish the public good, in bankruptcy relief as well as these other matters, some individuals obtain a mediate though secondarily intended advantage.

It is established that the State can relieve debtors to whatever extent is necessary to achieve the purpose of the common good. Now arises the question in regard to which moralists divide into two schools. Both schools agree that the State could, if it were considered necessary for the common good, relieve a man not from only legal bonds but also free him in conscience. The first school says that the State's purpose is accomplished by relieving the bankrupt *in foro externo*, it is not necessary to extend the relief to the ease of the conscience and hence the State has not the actual power to do so and the obligation remains after the legal discharge, if the bankrupt ever becomes able to discharge it. It maintains that the State has exhausted its powers when it permits courts *legally* to discharge all debts and claims,

tract, either in whole or in part, that neither this government nor that of any of the States possessed such a power. The obligation of a contract belongs not to the civil or political code, but the moral. It is imposed by an authority higher than human, and can be discharged by no power under heaven, without the assent of him to whom the obligation is due. It is binding on the conscience itself. If a discharged debtor had in his pocket the discharges of every government on earth, he would not be an honest man, should he refuse to pay his debts, if ever in his power." "Works," III, 512.

and that its function ends when the debtor's physical and social progress is no longer materially impeded. Its members say that a *cessio bonorum*, whether voluntary or ordered by the court upon the petition of the creditors, does not of itself and independently of the forgiveness of the creditors or other considerations, relieve the debtor of the moral obligation of making full payment out of his future acquisitions if he becomes able to do so. Against, or rather qualifying this view, Ortolan, a legal authority, observes: "The release from debt is always classed as a donation in Roman law,"¹⁹ and he refers to the law *cessio bonorum*. Macleod, the economist, states that, "The release of a debt is in all cases equivalent to a gift or payment in money."²⁰ Most theologians do not consider it so unless it is expressed or clearly implied. They deny that the public good is not completely accomplished unless the debtor's conscience is also relieved, and assert that the bankrupt is bound in conscience to pay a debt which he no longer legally owes.

Lemkuhl expresses the opinion of practically all theologians that, "The insolvent laws of England or of any other country cannot, of themselves, discharge the conscience of the debtor from further liability for his debts."²¹ Slater observes: "In most countries, as in America, it seems that the law only grants the bankrupt exemption from future molestation on the part of his creditors; it does not free him from moral obligation to pay his debts in full if ever he becomes able to do so."²² Archbishop Kendrick published his work on "Moral Theology" shortly after the enactment of the law of 1841. In his observation on this law he preferred the opinion that the Congress did not intend to liberate the conscience of the debtor, and he held as probable the opposite opinion.²³ Konings, another well-known American theologian, was somewhat in doubt and refrained from giving an opinion on the question.²⁴ Most theologians, perhaps nineteen

19 "Explication historiques des inst. Just.," liv. II, 543-57.

20 "The Theory of Credit." (Lond. 1889) I, 280.

21 "The Casuist," I, 172.

22 "A Manual of Moral Theology," I, 438. In England, *cessio bonorum* was known as "The Lord's Act." Story, II, 48.

23 "De Justitia," n. 207. Ceterum quum probabile sit Congressum dominio usum ut obligationem etiam conscientiae tollat, etc.

24 An *cessio bonorum* a solutione integra liberet? Mor. Theol. n. 861.

out of every twenty, hold the opinion that, in the ordinary case, without extenuating circumstances and without serious inconvenience to himself and those dependent on him, he is bound *coram Deo* to pay the balance of the debt.²⁵ The law simply destroys the legal contract.²⁶

This opinion seems to be supported by the natural feeling of the bankrupt and the attitude which society and the State assume toward him. Bankrupts are prone to feel guilty, just as any other debtor feels, until the debt is satisfied. A strong presumption that the State has not the power to afford relief beyond the legal discharge arises from the fact that the European States withhold privileges from the bankrupt until he has paid his debts in full. Tanquerey states that this is the case in France,²⁷ and Bulot nicely states the theory of the French law that article 1270 of the Code defers but does not extinguish the debt.²⁸ The civil law of Belgium is the same,²⁹ and according to Bucceroni, it is the same in Italy.³⁰ This interpretation prevails in Spain.³¹ Also, this fact demonstrates that the laws were not made for the individual but for the common welfare. Although generally commercial in spirit, from the early days of the practice in the sixteenth century until the present time all the great theologians of Europe have held the view that the moral obligation is not removed. Lugo wrote that the consensus of opinion of his contemporaries was that the obligation can not be extinguished by the ordinary law.³² Saint Alphonsus and Busembaum held the

25 Doctor Thomas Bouquillon held this view. Cf. "Theol. Mor. Fundamentalis," Paris, 1903. Cf. A. Tanquerey, *synop. Theol. Mor. ed. ter*; sec. 289; also Myer, "Institutiones Juris Naturalis," II.

26 *Nemo tenetur restituere cum suo valde majore detrimento, quam sit creditoris commodum.... Bonum inferioris ordinis restituendum non est cum detrimento boni superioris aequae gravis.* Kutscher, "Doctrine of Restitution."

27 In Gallia statuitur debitorem non liberari nisi secundum ea quae solvit, ita ut, si nova bona acquirat, teneatur ea dimittere usque ad intergam solutionem. "Synop. Theol. Mor." III, n. 674. Cf. supra n. 205.

28 "Comp. Mor. Theol.," I, 659.

29 Genicot, I, n. 604.

30 "Inst. Theol. Mor." I, n. 1466.

31 "Ferreres, Comp. Theol. Mor." I, n. 719.

32 *Vera tamen et communis doctorum sententia negat extinguere obligationem restituendi, etc. disp. 21, sec. 3, n. 40.*

same view, as well as Ballerini.³³ To cite these few authorities is sufficient. The preponderance of opinion of different moralists, formed in different countries and times and derived by different courses of reasoning, is to the effect that the obligation to pay the remainder of the debt is not removed by the operation of the usual bankruptcy law.

The second school contends that the State can completely eradicate the debt, even in conscience. Doctor Crolly, formerly a professor at Maynooth College, and an eminent theologian, in his work, contends that the laws of England entirely exonerate from debt both in the court of law and in conscience.³⁴ Martin, in his American note to Slater's work, reveals himself a disciple of this doctrine. His first argument is that incomplete discharge would be a curtailment of the power of the State and the purpose of the law. He writes: "This end is more effectually attained if the act is extended to liberate the debtor from the moral obligation of making full payment, and there is expediency for such extension." He continues there is nothing in the wording of the act of the United States which prescribes legal release only, the act discharging all provable debts except such as are excluded by it. Then he applies one of the interpretative rules of canonists: *Ubi lex non distinguit, nec non nos distinguere debemus.* His next proposition is based on the nature of conscience and is inconclusive. He says that seventy-five *per centum* of the bankrupts of our country are non-Catholics, who, unrestrained by the institution of confession, "pay no attention to obligations of conscience of this kind, being occupied solely with escaping penalties for the violation of civil laws." The twenty-five *per centum*, who are Catholics, he thinks, have more highly developed consciences and are thereby bound to pay the residue.³⁵ In order to be equitable, giving like advantage to Catholics and non-Catholics, the law should be interpreted to release all, or none, in conscience, and since some will not continue bound in conscience,

33 Quod si (bonis cedens) tamen postea rediret ad pinguiolem fortunam, tenetur adhuc restituere. Lib. IV, n. 699. Ballerini, "Opus Theol. Mor." III, 451.

34 "De Just. et Jure," III, n. 1232.

35 "Manual," 440 et seq.

the law should be construed as conferring plenary release.³⁶ Martin states further: "If the bankrupt law be so interpreted that the moral obligation remains, the civil authority would appear to be protecting dishonest people in their dishonesty, since it would virtually say to such bankrupts, 'You need not pay the balance of your debts.'³⁷ It is plain that the civil authority would thus be acting against the purpose for which both itself and the bankruptcy law were instituted and therefore beyond its power." He states that he has reason to believe that Sabetti and Konings, if writing to-day, "Would hold the debtor's obligation extinguished, either on the ground of full remission being granted under the Act, or by the consent of the creditor."³⁸

The conclusion of the *casuist*³⁹ based on Marshall's decision in *Sturges versus Crowninshield*,⁴⁰ which Martin also uses, is a glaring *non-sequitur*. A close study of Marshall's reasoning shows that the discharge to which he referred was a legal discharge only, when he said: "The insolvent laws of most of the States only discharge the person of the debtor and leave his obligation to pay out of his future acquisitions in full force." These State laws were based on the Roman law, *cessio bonorum*, which exempted only the person of the debtor from imprisonment, and if philosophers or theologians adopt *cessio bonorum* as the basis of their reasoning, they can not conclude that the debt is morally obliterated.

Martin suggests a circumstance which would remit the obligation even in conscience. This is the virtual remission of the debt by the creditor on account of modern business methods and conditions. Business men are presumed to enter into an implied agreement that in the event of a *bona fide* failure the assets are to be accepted in full settlement. These catastrophes are calculated for and terms are made with such contingencies in view. A wholesale firm computes its probable losses from failures in a specific period and distributes it in the price of goods sold on credit, which may be viewed as a premium paid for credit.

36 The references from Martin must not in any way be construed as indicating the opinion of the writer on this point.

37 *Ibid.*, 442.

38 *Ibid.*, 447.

39 *I.*, 174.

40 4 Wheaton, 122, et seq.

ex ante
prob. of failure
should be considered

Thus all the debtors pay a proportionate share. Were there no such contingencies, rates and prices would undoubtedly be lower. If an honest retailer fail, the wholesale house or manufacturer gets his assets, and his fellow buyers and the bankrupt have long before made up the deficit. If the bankrupt owe any one, it is his fellow traders, but they are too numerous and the amount too slight in the individual case to become the subject of consideration.⁴¹

There is weight and merit in the contention of the second school that the law should be applied so as to obliterate all liability, if it is considered as a matter of argument, but it is to be feared that practical adoption of its view would be morally corrupting, a result not desired by theologians, legislators, business men or any body. That it is inexpedient is proved by the success and adequacy of the prevailing interpretation.

A few eminent teachers assert that in accepting dividends out of the assets, the creditors remit the debt. Of course, these arguments, or any which go to quiet the conscience, do not apply in cases of private debt, such as money borrowed from one not in the business of making loans, or in the case of a personal charge owed to a dressmaker, *etc.*, who takes no security against losses.⁴² Some rigorists go so far as to consider future acquisitions, talent, industry and integrity, as well as present possessions, the basis of credit and within the conditions of the contract at its making. Others have thought that an undischarged bankrupt or one who has not paid the deficiency should not be permitted to contribute to the support of the Church or to public charity. They consider that he can not do so in Christian honesty.

We come now to a summarized consideration of the development of the Federal bankruptcy system. The origins of its numerous doctrines are found scattered over the civilized world throughout a period of twenty-five centuries. From a legal

⁴¹ Sabetti, in his "Moral Theology for the United States," holds that: *Attamen si quandoque ex rerum adjunctis apparet creditores velle omnia condonare, vel alicubi ita fieri commercium ut ratio habeatur inter mercatores probabilis futurae cessionis bonorum, non videtur tunc cur imponenda sit obligatio in perpetuum.* n. 463.

⁴² "Casuist," I, 176.

procedure adopted for the benefit of the creditors it has been transmuted into a commercial policy abounding with utility and profit alike for the debtors and the creditors of the entire community. It has been evolved in conformity with the exposition of William Penn, when he declared:

"We have (with reverence to God, and good conscience to Men) to the best of our Skill, contrived and composed the Frame and Laws of the Government, to the great End of all Government, viz., to support Power in Reverence with the People; that they may be free by their just Obedience, and the Magistrates Honourable for their just administration; For Liberty without Obedience is Confusion, and Obedience without Liberty is Slavery. To carry this evenness is partly owing to the Constitution, and partly to the Magistracy; Where either of these fail, Government will be subject to convulsions; but where both are wanting, it must be totally subverted; Then where both meet, the Government is like to endure. . . ."⁴³

The legal, moral and social-economic principles which inspired and guided the Constitutional Convention in providing for the system, the legislators in producing it and the courts in defining and interpreting it, have been, in a measure, explained. The opinions of authorities have been cited and quoted to show the lodgment of ample powers for the purposes of the system in the National Government. The limitations on the States in this respect are now universally admitted, and the agitation for States' rights in this and other respects is now but a matter of history. The various laws which served as stepping-stones to our adequate laws of the present day have been reviewed with regard to their principal features. It is impossible to discuss in a limited space the details of the existing system. A cursory examination of its distinguishing features begins with the summary seizure of the insolvent debtor's property for the purpose of proportionate division of the residue among his creditors, and such discussion is within the domain of legal disquisition.

The race of diligence among creditors is at an end. To accomplish in the highest degree the ends of justice all causes are cognizable by Federal courts with ample powers and uniform procedure. The bankruptcy courts are established in every

county throughout the United States. A long step in advance is made by bringing the proceedings home to those who are in no position to bear the expense of a trial in a court sitting at a distant place. Bankrupts or their creditors could not be furnished a more simple, less expensive or more expeditious procedure. The surrender of the debtor's estate free from preferences is demanded. The law provides for the appointment of receivers and referees with power to allow or disallow claims, to take measures for the preservation and liquidation of the assets and to determine all controversies while so doing. Authority is given to arraign and try the principals, officers or agents, and to enforce decisions by fines or by imprisonment. In case of necessity, the parties to a controversy may be extradited from one district to another. Not the least among the virtues of our law is its inexpensiveness. Every effort is made to keep the costs at a minimum. Expedition is encouraged by making the dividends to the creditors payable at stated times and the reasonable fees of the officers payable in the final stages of the process. The crown jewel of this legislation is its capacity legally to discharge the bankrupt from the payment of his provable debts, and to enable him subsequently to enjoy with tranquility the fruit of his labor.

The history of these laws is evidence of man's humanity to his fellow man. While all concede that as long as men barter, bankruptcy will be one of the evils of society, it is now regarded, not as a crime, but as a misfortune, not as a disgrace, but as a malady which needs the soothing remedy of sympathy and encouragement.

There are many unanswerable reasons applying at all times and in all conditions and stages of government which prove that such system should be a permanent part of the National legislation. In beholding the excellent laws for the relief of insoluble debt in the United States, a line in Franklin's farewell address to the Constitutional Convention recurs as applicable to this clause of that *Constitution* to which he referred. He said: "It astounds me, sir, to find the system approaching so near to perfection as it does."⁴⁴

APPENDIX A.

Different form of the word "bankrupt" found in the English language, arranged chronologically, author, work and spelling.

- 1533, More, *Apol. XXI Wks.* 881/2, "bancke roughtes."
- 1548, Hall, *Chron. Hen. VII*, an. II, 37, "banqueroutes."
- 1552, Huloet, "bankerowten" or "make banckerowte."
- 1562, Bulleyn, bk. *Simples in Babees*, (1868), p. 241, "Utterly undone, and cast either into miserable pouertie, prisonment, bankeroute,"
- 1563, Gerbier, *Counsel E*, j, 6 " bankrouts prevented."
- 1566, T. Stapleton, *Ret. Untr, Jewel*, "Banckeroute."
- 1577, Northbrooke, *Dicing*, "It is a doore and windowe into pourtie and bankrupting."
- 1577, Holinshed, *Chron.* III "bankerupt."
- 1580, Baret, *Alv. B.* 139, "banqueroute."
- 1580, *Ord. Prayer in Liturg. Serv. Q. Eliz.* p. 573, "bankeroute."
- 1593, R. Harvey, *Philad.*, "bankrupts."
- 1600, J. Harrington, *Epigram in Singer, Playing Cards*, p. 254, "bankerout."
- 1601, Cornwallyses, *Ess.* II, 208, "Banquerupt."
- 1613, R. C. *Table Alph. Bankerupt*, "bankrout."
- 1613, Raleigh, *Hist. World.*, IV, 7, 533, "bankrouts."
- 1617, Collins, *Def. Bish, Ely*, II, 367, "bankruptures of religion."
- 1620, Z. Boyd, *Zion's Flowers*, 49, "banker-up."
- 1623, Bacon, *Works*, XII, 448, "bankrupts."
- 1630, J. Taylor, *Works*, III, "He is in danger of breaking, or bankruptisme."
- 1643, Horn and Rob., *Gate Lang.*, 865, "bankrout."
- 1656, Earl Monmouth, *Advt, Parnass.* No. 59, "The most important Bankruptship that ever happened"
- 1668, *London Gazette*, No. 273/2, "The Sieur Tiller being lately bankrupted and fled."
- 1684, *London Gazette*, No. 1980/4, "Empowered by the Commissioners of bankrupt."
- 1698, *Def. Lib. against Tyrants*, 144, "Can the bankrumpting of one of the obligees quit the rest of the engagement?"

1698, *Henry VIII*, I, 609, "With danger to make banke rota."

34 and 35 *Henry VIII*, c. 4, "An act against suche parsons as do make bankrupt."

1700, J. Law, *Counc. Trade*, intro., 14, "bankruptsie."

1709, Steele, *Tatler*, No. 44, "bankrupt."

Other forms used are: banke rota, banckroupt (e), banque-rowpte, banqweroote, banquerupt, bankrupt, bankruptcy and bankruptship.

Cf. Century Dict. and Cyc.; Encyc. Brit. (11th edit.); Johnson's Univer. Cyc.; Skeat's Etymol. Dict.; Murray's Dict. of the Eng. Lang.; Funk & Wagnalls' Dict. of the Eng. Lang.; Mueller's Etymol. Dict.; and Dufresne, I, 969.

APPENDIX B.

TABLE OF CASES.

The opinions expressed in the following cases, in a particular way, had the effect of interpreting the constitutional clause and defining the operation of the various acts created by the power granted to the Congress by the *Constitution*.

- Adams *vs.* Storey, 1 Payne 79.
Baldwin *vs.* Bank of Newbury, 1 Wallace 234.
Beers *et al vs.* Broadnax, 14 Peters, 67.
Belton *vs.* Hodges, 9 Bingham 365.
Blanchard *vs.* Russell, 13 Mass. 1.
Boese *vs.* King, 108 U. S. 379.
Boyle *vs.* Zacherie and Turner, 6 Peters 348.
Brown *vs.* Smart, 145 U. S. 454.
Butler *vs.* Gorely, 146 U. S. 303.
Calder *vs.* Bull, 3 Dallas 386.
In re California Pac. RR., 3 Sawyer 240.
Clay *vs.* Smith, 3 Peters 411.
Connelly *vs.* Corbett, 3 Seldon 500.
Cook *vs.* Moffat *et al*, 5 Howard 295.
Evans *vs.* Eaton, 3 Wheaton 454.
Farmers' and Mechanics' Bank *vs.* Smith, 6 Wheat. 131.
Fiske *vs.* Jefferson Police Jury, 116 U. S. 131.
Fletcher *vs.* Peck, 6 Cranch 87.
Ex Parte Franks, 7 Bingham 762.
Gilman *vs.* Lockwood, 4 Wallace 409.
Golden *vs.* Prince, 3 Wash. C. C. R. 313.
Gunn *vs.* Barry, 15 Wallace 610.
Kelly *vs.* Drury, 9 Allen 27.
In re Klein, 1 Howard 277, *in notis*.
Kunzler *vs.* Kohaus, 5 Hill 317.
Marshall *vs.* Rutton, 8 T. R. 545.
McCormich *vs.* Pickering, 4 Comstock (N. Y.) 276.
McMillan *vs.* McNeil, 4 Wheat. 209.
Norris *vs.* Atkinson, 64 N. H. 87.

- O'Brien *vs.* Cune, 3 C. & P. 283.
Ogden *vs.* Saunders, 12 Wheat. 213.
Owings *vs.* Speed *et al*, 5 Wheat. 420.
Perley *vs.* Mason, 3 Atl. 629.
Sackett *vs.* Andross, 5 Hill 327.
Scribner *vs.* Fisher, 2 Gray 43.
In re Silverman, 1 Sawyer 410.
Sturgess *vs.* Crowninshield, 4 Wheat. 122.
Thompson *vs.* Alger, 12 Metcalf 428.
Trustees of Dartmouth College *vs.* Woodward, 4 Wheat. 518.
United States *vs.* Fisher *et al*, 2 Cranch 358.
United States *vs.* Kederickson, C. C. U. S. P. Oct. 1831, M. S.
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APPENDIX C.

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The Albany Plan, Carson.
Principles of Constitutional Law, Cooley.
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The thesis, *A History of the Bankruptcy Clause of the Constitution of the United States of America*, was undertaken at the suggestion of Charles H. McCarthy, Ph.D., who stated that there had been no systematic, historical treatment of the constitutional provision respecting bankruptcies. His opinion has been verified, and the thesis is a brief study of a vast and considerably neglected subject.

The writer expresses his appreciation to the Knights of Columbus for the advantages which he has obtained as the holder, in the Catholic University of America, of a Knights of Columbus Fellowship; to Charles H. McCarthy, Ph.D., his major professor, for many kindnesses; for their personal interest to Frank O'Hara, Ph.D., director of the first minor studies and to the Reverend William J. Kerby, S.T.L., LL.D., Doctor in Science Politiques et Sociales, who directed the studies in the second minor course.

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